

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,) Docket No. 3:06-CR-719

 Plaintiffs,) Toledo, Ohio

 v.) April 28, 2008

MOHAMMED AMAWI, ET AL.,)

 Defendants.)

TRANSCRIPT OF JURY TRIAL, VOLUME 38
BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT JUDGE

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1 THE COURT: Okay. We can just speak loudly until
2 we can get some microphones.

3 But where are we on the stipulations/definitions?

4 MR. TERESINSKI: Your Honor, we've given defense
5 counsel and Your Honor a copy of what we had worked out in
6 Washington. And if we can give them the chance to look at
7 that, there's some minor modifications, I don't think
8 they're that big, I really don't. So I guess we'll have a
9 chance to talk about that after they've had a chance to
10 digest that. But I think we're on the right track, at
11 least I don't think we're that far off.

12 THE COURT: Good. Okay. Well, perhaps tomorrow
13 morning, if you'll let me know, communicate with each other
14 and --

15 MR. TERESINSKI: I can speak to a representative
16 or member of each defendant, so if it's you, John, is it?

17 MR. HARTMAN: Probably if -- we'll just go with
18 those guys.

19 MR. TERESINSKI: I'll talk to Jeff. I'll check
20 with Jeff and Jonathan Whitmer-Rich.

21 THE COURT: Good. Okay. The next matter I
22 gather would be on transcripts and all that.

23 MR. SOFER: Yes, Judge, we spent a wonderful four
24 plus hours with the El-Hindi team on Sunday, like watching
25 a football game -- losing, that's as much joy as I got out

1 of it. Nevertheless, I think it may -- oh -- I'll let
2 counsel correct me if I'm wrong -- significant progress in
3 framing out of the issues. We can do this however The
4 Court wants. We basically -- we basically went through --
5 there are now 20 transcripts/audio/videos that counsel has
6 an interest in using for cross-examination.

7 The government has -- counsel outlined the
8 reasons that they were interested in using these, and the
9 government explained its reasons and objections for either
10 limiting its use or barring its use or not. There were
11 occasions when I think we were in all agreement.

12 Basically, Judge, this continues to be the same
13 issues. These are concrete examples -- we can go through
14 each of them if you'd like -- they tend to be repetitive in
15 the sense that the issues are similar.

16 THE COURT: Okay.

17 MR. SOFER: But just to outline problems, to the
18 extent that there are problems, the government's position
19 remains that while playing the audio and/or video may be
20 appropriate in some cases, it sort of depends what the --
21 for lack of a better word, predicate questions are of the
22 witness. If the witness is asked questions relating to
23 these transcripts, and either denies or doesn't recall
24 things, then another step can be taken. It's -- it
25 should -- our position is, it should be no different than

1 cross examining a witness with a document or any other kind
2 of evidence. And counsel, for the most part, agrees with
3 that.

4 We did find two -- there are two instances of
5 videos that counsel wants to play. One of the videos, the
6 government did not play on its direct take, but was
7 planning on playing at a future time and I'm --

8 THE COURT: You mean in the direct examination of
9 Griffin?

10 MR. SOFER: That's what I meant, I'm sorry, I --
11 Judge -- and might well have played it in our redirect of
12 Mr. Griffin or at some future time in the case. I am
13 perfectly happy to have it played now, so long as counsel
14 doesn't argue to the jury that we were trying to hide it or
15 something. And --

16 THE COURT: Alternatively, unless there's
17 strenuous objection, if you would feel a tad more
18 comfortable starting off things tomorrow by saying, ladies
19 and gentlemen, The Court -- play video -- to play another
20 video for Mr. Griffin, that's up to you guys.

21 MR. SOFER: I think we've worked this out, I'm
22 not sure, but a logistical problem. Logistical problem,
23 not surprisingly, the government and the defense is blocked
24 off different portions of this video.

25 My objection, my second broad objection is this

1 notion of completeness. I think if we're going to say
2 certain things have to be complete for the defense, then
3 they also have to be complete for the government. And
4 so -- and this one's a good example where defense wants to
5 play little pieces. I want them to play our pieces, too,
6 to put the whole thing in sort of context.

7 What we're doing now is trying to figure out
8 whether we can play their pieces and then our pieces, the
9 way we did with the Amawi people one instance or whether
10 sometimes our pieces might overlap with their pieces, which
11 would not be unusual. So we're in the midst of doing that
12 now.

13 We sent to the defense our pieces that I've seen
14 theirs. One way or another, we're going to try to play
15 most of -- of, I think, our agreement. And again, this was
16 subject to counsel's objections, but I think what we worked
17 out yesterday is we're going to play most of this video for
18 the jury. It's a video which audio has already been
19 introduced. It's the audio of the February 16th meeting
20 inside Marwan El-Hindi's home. The other video that falls
21 into a similar category.

22 THE COURT: This is a Griffin video?

23 MR. SOFER: Yes, Judge. And that's all we're
24 talking about here. We haven't even talked at all about
25 any videos or other matters not related to the transcripts

1 that we have.

2 The other video is a video that was played -- a
3 video that was already played for the jury, and I think
4 we've also said we'd be willing to let that play again.
5 The first video I described from February 16th is 76
6 minutes long. I don't know that when you add our pieces
7 plus the defense pieces, you're going to get all 76
8 minutes. I'm hopeful that you won't be because some of
9 them will probably -- both sets of counsel.

10 Anyway, so for those two pieces of evidence, I
11 don't think we have an objection or problem playing what
12 amounts to a large chunk of -- of a recording. One of
13 which is in evidence, the other one I think we'll have a
14 stipulation that should go into evidence. And as I said,
15 the government -- planned on putting this into evidence at
16 a later time.

17 So that leads us, then, to the specific example,
18 Judge, and I think as with everything, it's a lot clearer
19 when you actually see this stuff. And I don't know that
20 all the other counsel have to be that -- here for that.

21 We have a little logistical issue of our own
22 team. Justin Herdman has been -- has a matter that he has
23 to take -- had to take care of in Cleveland, and I believe
24 he's in route as we speak. I don't know exactly what time
25 he hopes to get here, but before we discuss Evan Kohlmann,

1 I'd like to give him an opportunity to be here. If it's an
2 emergency, I can handle it.

3 THE COURT: No problem at all.

4 MR. SOFER: And we're, as I said on Friday, the
5 government is keenly interested on getting a decision from
6 The Court on the expert witness portion of the case just so
7 we can plan to go forward. Obviously, that's linked to
8 some extent with the stipulations, and we recognize that.
9 And so I understand that could make things a little bit
10 more complicated, but I think our position remains with
11 respect to some of the experts, at least that some of the
12 things we've discussed -- and I don't remember, I don't
13 think we finished on Friday a discussion of the second
14 Amawi expert. I could be wrong about that. But my
15 understanding was we hadn't quite finished that discussion.
16 I'd like to have Mr. Herdman here for that also if
17 possible.

18 THE COURT: No problem.

19 MR. SOFER: It won't take us four hours to go
20 through this. We know what the arguments are. It's up to
21 Your Honor how you want to proceed.

22 THE COURT: Well, I don't have the transcripts
23 with me. I can get them here in three minutes or five
24 minutes. They're down in the car. Do you think I need
25 them or not?

1 MR. SOFER: I don't even really know that that's
2 necessary. I think for the most part between government
3 and counsel, we'd be able to put things up on the ELMO, if
4 we can turn that on.

5 Let me make this clear, Judge. I don't know that
6 this is really -- I think we found that there was a lot of
7 agreement when we actually sat down. And we probably
8 should have started with that on the notion of what I
9 described before, which is, we have no objection to
10 questions being asked of Mr. Griffin. Vigorous
11 cross-examination, obviously, is something the defense is
12 going to be entitled to. And we have no objection to using
13 transcripts to cross-examine Mr. Griffin. And asking him
14 questions didn't this happen, didn't this happen, didn't
15 you say this, wasn't this -- didn't this take place this
16 way, and then using the transcripts, possibly, to impeach
17 him or refresh his recollection, that is the -- I think,
18 the preferred mechanism of doing this.

19 The problem the government has is in the outright
20 playing of these things. I don't think counsel plans to do
21 any more other than the ones we discussed. And I have some
22 issues about, on occasion, when the defense has identified
23 portions we have completeness problems with this now, and I
24 also have issues occasionally, but not very much, with the
25 defense essentially not using this really for cross. What

1 they're really trying to do is get another point across.
2 And I don't believe that they can do that in this matter
3 through this witness. There are other ways of doing it.
4 We can debate that when we get there, I think.

5 But, you know, for instance, there are just times
6 when essentially what the defense are trying to do, put in
7 here, say, to support some other kind of argument. And
8 again, the government will object strenuously to recalling
9 Mr. Griffin in the middle of the defense case. I don't
10 think that's appropriate either. So I'm not suggesting
11 that they should get another crack at him later on. That
12 would be highly inappropriate. But there are other ways of
13 them introducing transcripts, and we might stipulate to the
14 introduction of certain transcripts, if The Court were to
15 find that they were admissible for some purpose.

16 What we basically did -- and I credit counsel for
17 going through this with us -- at least they told us why
18 they wanted to put it in. We told them why it is we
19 thought they couldn't, where those issues existed. But I
20 think counsel has said about half, and I think it's
21 probably about right. If they're willing to go through the
22 rules of evidence in the way that they're using them, at
23 least with half of these, we have zero issue on that.

24 MR. HARTMAN: I think that's accurate. I think
25 the issues that will come up are more along the lines of

1 the -- the hearsay issues and things like that are the ones
2 that we want to play. I think the government will have --
3 we worked most of it out and said, look at a certain clip,
4 and we said, okay, what we'll do is we'll ask him X, Y, and
5 Z, and if he says, yes, we made our point, then we put this
6 aside. And if he says, no, we'll use the transcript. And
7 some of the times we said we want to play the clip, and
8 some of those have been put in -- some of those are in
9 evidence already.

10 THE COURT: Are you all telling me -- excuse
11 me -- that maybe the easier, if not the only way, to do
12 this is just wait?

13 MR. HARTMAN: I don't know if they all are, but I
14 think I am.

15 THE COURT: I don't really care one way or the
16 other. Whatever's going to reduce the time spent waiting
17 for the jury sitting around chatting in the box while we're
18 chatting in the corner.

19 MR. SOFER: If you want to reduce that time, then
20 we should go through these one by one, Judge. I don't
21 think it's going to be if -- you know, but I think if it
22 turns out we don't have problems with half of them, we're
23 talking about ten of these transcripts for Your Honor to
24 look at --

25 THE COURT: Okay, we'll take a look at --

1 MR. SOFER: -- and try to resolve the issues or
2 at least be in a position to know what we're talking about
3 so we don't have to, for the first time, do this at
4 sidebar.

5 THE COURT: I agree. I may not be able to rule.
6 Now, of those ten or so, can you cluster them in into types
7 or should we start with number one and go through them?
8 Whatever is easier, okay. That's the benchmark.

9 MR. SOFER: For us, Judge, I have the same pile
10 we had yesterday with counsel. I'm happy to go through
11 them they're in chronological order; that's the best way to
12 do it.

13 THE COURT: Okay.

14 MR. SOFER: And again, maybe that as we go
15 through these we'll come to more agreement, I don't know.
16 But we're prepared to go forward now.

17 THE COURT: Okay.

18 Mr. Hartman, what about yourself?

19 MR. HARTMAN: If that's what The Court wants to
20 do, that's fine.

21 THE COURT: So at least I know what's going on,
22 sort of. Why don't you tell me where we are, what it is,
23 and what the problem is.

24 MR. SOFER: Just so we're clear what we're
25 talking about, I don't have the government exhibit numbers,

1 but this is from January 28th, 2004, 1D62.

2 It's a little blurry. Unfortunately I didn't
3 choose this, Your Honor, but the defense picked blue and we
4 picked --

5 THE COURT: That's better.

6 MR. SOFER: -- and we have red, so it's sort of
7 psychodelic at some point. So here just -- Your Honor, is
8 an example of what the defense is seeking to use, and I'll
9 proffer instead -- it's up to you, counsel, what you want
10 to say, but I'll proffer why I believe counsel wants to use
11 this.

12 THE COURT: Why don't I ask them? What's your --
13 why don't you tell me what your objection is?

14 MR. SOFER: I have no objection to this being
15 used to cross-examine the defendant. Meaning -- I mean,
16 I'm sorry -- Mr. Griffin -- if it turns out that
17 Mr. Griffin doesn't recall this event because, after all,
18 it happened on January 28th of 2004, then I believe that
19 counsel can show this particular transcript to the witness.
20 If he doesn't -- that is, if he doesn't remember, he denies
21 making.

22 Now, frankly, Judge, this conversation takes
23 place five months -- five months before the charges in this
24 case are alleged to have begun. And so I think I told
25 counsel also, to the extent that there is a large volume of

1 material prior to the crime being committed here, I think
2 that would be inappropriate. But given what counsel has
3 said about the reason I think that they're putting this in,
4 we don't have a problem with them cross-examining the
5 witness with this one.

6 Now, playing it is another matter. That we would
7 object to.

8 THE COURT: Okay.

9 MR. SOFER: But I think we've agreed that that's
10 not what counsel plans.

11 THE COURT: Cindy, is there anything we can do to
12 make this a little more visible?

13 MR. SOFER: Anyway, I don't think we have a
14 problem with this; is that right, counsel?

15 MR. HARTMAN: I don't think we have a problem. I
16 mean, as to the -- as to playing things before the charges,
17 I think that door was opened by Mr. Getz in his opening
18 statement. And number two, if it's material to our
19 defense, I think we can do it anyway.

20 So whether it's five months before the official
21 conspiracy was supposed to have started, I don't think
22 matters, but, yeah, I agree. We're going to ask him and --
23 and if we don't -- I mean, we're going to ask him a lot of
24 things about what he said and did with our client at
25 certain times and certain dates, and if he tells the truth,

1 then there's no reason to use any of this.

2 THE COURT: Okay.

3 MR. HARTMAN: And if he doesn't, then we'll say
4 look at this.

5 THE COURT: And what is the purpose for which you
6 will be asking him those things?

7 MR. HARTMAN: To impeach him and to show his
8 methods of operating with our client.

9 MR. SOFER: And Judge, I guess on a broad
10 scale -- I've used this analogy, I think, before -- but if
11 there are particular methods that are being used, that's --
12 we're back to this sort of Dr. Shy stuff about how people
13 do things without even knowing it, and I don't really know
14 that that is appropriate.

15 THE COURT: Well, I -- I don't have a problem
16 with him developing factual predicate. I have continuing
17 problems and actually spent a good part of the weekend in
18 trying to look, too, and I ran out of time to tend to the
19 Kohlmann stuff, so I'll need a sort of primer when
20 Mr. Herdman shows up with that. Depending upon how you
21 frame your questions and predicate, I don't know how to do
22 it, okay. So whatever example I give is sort of
23 blindfolded in the dark.

24 MR. HARTMAN: Well, I can --

25 THE COURT: Have you tried to, Mr. --

1 Mr. Griffin, you would interject subjects to training or
2 similar subjects into the conversation?

3 MR. HARTMAN: That's a good example.

4 THE COURT: Yeah. And you would do so during
5 many, if not most of the conversations that you had with
6 whomever, yes.

7 And about -- and in that case, I think we kind of
8 shut -- approximately how many conversations, with what
9 sort of frequency, how often do you recall doing that? Do
10 you recall doing that on month, day, whatever, talking to
11 Mr. El-Hindi? No, I don't.

12 I show you what's been marked government exhibit,
13 whatever, transcript pages from here to there, and I'll ask
14 you to read to yourself. And on reading that, do you now
15 recall that you were asked -- you -- Mr. El-Hindi, in a
16 couple sentences here, there, and move on down the road.

17 I think that's the most you can do.

18 MR. SOFER: And Judge --

19 THE COURT: Or even that might be unacceptable to
20 Mr. Sofer.

21 MR. SOFER: No, I accept that. And I -- I think
22 that is a perfectly appropriate way of cross-examining a
23 witness.

24 Again, I think we've worked this out. This one's
25 a good example, though, Judge, because this is the outer

1 edge of that concept. This is a conversation that takes
2 place -- that's the outer edge of this concept. This
3 conversation takes place five months before the charges in
4 this case.

5 I assume what counsel will say that for five
6 months, maybe a year, two years, Mr. Griffin was sort of
7 working this defendant towards this conspiracy, maybe
8 that's their argument, which is why I have not objected
9 specifically perhaps to this one. This one, also, the word
10 "recruiting" is used, so I think we've talked about this.
11 Counsel does not hide the ball. Counsel wants to say that
12 they talked about recruiting in other -- in other contexts,
13 some of them innocent contexts, which I would probably
14 stipulate under the circumstances, this one probably is.
15 I'm not stipulating, I'm just saying I probably would
16 stipulate.

17 The question is, at what point does become -- and
18 I use this analogy with counsel yesterday -- when ten
19 mobsters are sitting around the table and they are having a
20 four-hour-long conversation about the food that they were
21 going to eat, and then there's four minutes of conversation
22 about killing somebody for the sake of the conspiracy, I
23 think it is objectionable, and this may be.

24 THE COURT: To spend a whole lot of time on the
25 meat balances.

1 MR. SOFER: Indeed, the meat balances are fluff.
2 In this case, there's more bread than meat.

3 THE COURT: But it seems to me that so far, much
4 of your exam -- frequently, in your examination and thus
5 far on cross-examination, Mr. Griffin would carry various
6 thrusts, or in your case, sort of elaborate or explain what
7 he's doing as quote "information gathering." And he would
8 be asked, yes, I was gathering information.

9 And it seems to me -- and tell me if this is what
10 you're about or not -- but one of the things, for example,
11 with a piece like this. I misunderstood this. I thought
12 they were talking about something to do with what brings us
13 here, but apparently not. But it seems to me that it is
14 appropriate to ask Mr. Griffin, you say you were, quote,
15 gathering information, what do you mean by gathering
16 information?

17 And that may be a risky question on cross, I
18 don't know. I'm glad I sit up here, okay. The mistakes I
19 make, I find about two years later from Cincinnati.

20 And you know, tells you and -- and was the,
21 quote, gathering information to talk about recruitment, to
22 talk about shooting, I mean, just -- and then, Mr. Griffin,
23 do you recall talking about this subject or that, was that,
24 quote, gathering information?

25 I honestly think I'm being entirely open with

1 this. He quite clearly is trying to define or cabin what
2 he was about in a way that was such -- he was out there,
3 ears open, paying attention, finding out what's going on.
4 And of course, in the defense prospective, he's out there
5 not tossing just folks, but nets into the water, and I have
6 no idea if that's what you're about or not.

7 You help me. It's your cross-examination that
8 we're trying to have me, in effect, permit the more
9 expansive, Mr. Sofer, and I agree that I don't think you
10 can -- clearly, you can't put your case in, but --

11 MR. SOFER: But before we --

12 THE COURT: The other thing is, this is outside
13 the scope of direct examination.

14 MR. SOFER: But again, I don't want to -- I don't
15 want to undermine what we did yesterday. I am agreeing
16 that this is, under the circumstances, given the connection
17 here, that is the concept of recruiting which is -- which
18 is something that the government has alleged that this
19 defendant did, in fact, recruit two individuals. Now, they
20 didn't come from this --

21 THE COURT: -- conversation.

22 MR. SOFER: -- this conversation. The government
23 has not alleged that. The government's also put
24 Mr. Griffin on the stand and elicited from him that he
25 engaged in other business activities with Mr. El-Hindi. Is

1 some of them, you know, I don't want to call it
2 necessarily, I don't know, legitimate, but they certainly
3 weren't necessarily terrorism related either.

4 And then, again, I think Mr. Griffin has
5 testified contrary to what, Your Honor -- I think where you
6 were headed, that he did spend time with these defendants
7 and in some -- and did other things with them as part of,
8 you don't walk -- as he said, you don't walk in and say,
9 hi, I'm with the FBI, I'm collecting information on you.
10 You have to build some sort of relationship. An undercover
11 police officer or civilian does. I don't think we have to
12 talk about -- I'm using this as an example because I think
13 it begins -- it's not so much an issue for the
14 cross-examination per se. This is the outside limit of
15 what I was willing to go ad hoc with.

16 THE COURT: Okay, I misunderstood.

17 MR. SOFER: And under the circumstances, again,
18 it's five months prior to the charges. I'm just trying to
19 orient, Your Honor, where I think we are. What I'm saying
20 is, to the extent that the cross-examination goes beyond
21 this kind of thing or it ends up using a more voluminous
22 examples of this kind of thing, the government would object
23 under the theory that at some point, this does become the
24 meatball analogy where we have moved beyond showing what
25 Mr. Griffin might be doing to try to show what Mr. El-Hindi

1 was thinking when he wasn't thinking about the charges in
2 this case, and that's not -- that's not relevant. We are
3 going to get to some of those examples, which is why I am
4 raising this issue. Nevertheless --

5 THE COURT: Yeah, I would agree that that --

6 MR. SOFER: -- nevertheless, we've already talked
7 about this, and I already told counsel, go ahead, have at
8 him, and we'll --

9 THE COURT: So when do we get to the ones that
10 you are disagreeing with?

11 MR. SOFER: We're going. I promise it won't be
12 this long. I think it's important The Court understand
13 where we are in the big picture so we can go through the --
14 second one. The defense, as I understand it, wants to use
15 three clips -- also outside the time frame of the
16 conspiracy -- and they relate to -- I'll put it up on
17 the ELMO here. Here's one and -- and the government's
18 also --

19 THE COURT: Just what day?

20 MR. SOFER: This is from February 3rd, 2004.
21 It's 1D63. Again -- and this goes for, I think, all three
22 of these, but I'd have to look. Again, I have no problem
23 so long as we're in agreement that this is going to be done
24 via the rules of evidence we've discussed. If, on the
25 other hand -- for this and a number of others like it -- if

1 what counsel's going to do ultimately is try to play this
2 for the witness or the jury, then I have a problem with the
3 rule of completeness, because, basically, if you look, you
4 can see that they've taken two lines out of something that,
5 you know, obviously is very long. If it's -- and I think
6 that's an unfair position to put the witness in.

7 Likewise, if they're going to cross-examine him,
8 I'd ask that they be asked to show him at least a little
9 bit of text before and a little bit of text afterwards, if
10 they're going to show him a transcript, so he knows what
11 they're talking about. He can't just take these segments
12 out.

13 MR. HARTMAN: And we don't intend to play the
14 vast majority of these unless Griffin flat out lies about
15 what happens after we show him the transcript.

16 THE COURT: So then what's the problem here?

17 MR. HARTMAN: I don't have one. I don't mean to
18 be flip, but I agree with what Mr. Sofer is saying.

19 THE COURT: Time out. Time out. You presently
20 anticipate, to the extent that you can, you'll ask
21 Mr. Griffin, on occasion, you talked about, quote, business
22 plans with Mr. El-Hindi; is that correct? Yeah. And do
23 you recall doing so on February 4th -- whatever that date
24 was -- 2004? I don't know, maybe. May I show you, dah,
25 dah, dah, read it to yourself. I ask you again, now do you

1 recall having talked about business plans? Yes. You read
2 line X to Y. Sure, that's --

3 MR. HARTMAN: Let me show The Court an example
4 you were just talking about. This is from that date, too,
5 and this is talking about -- they're talking about a
6 business idea to get a building, do a halfway house, get
7 grants for that, yeah, we can fill that place, and then --
8 and then Griffin interjects, so let's go back to your
9 recruiting with him.

10 And that's an example, we believe, of Griffin
11 injecting the concept of recruiting. And we'll ask him did
12 you do that on the regular basis? We have a -- we have a
13 chart we don't intend to use with him, but we may try to
14 use in closing. There are 15 to 18 different definitions
15 of training in conversations between Griffin and El-Hindi.
16 We're going to ask him about the fact that sometimes when
17 they spoke training, they were actually talking about
18 El-Hindi's children playing soccer. They were talking
19 about all sorts of different things when they use the word
20 "training."

21 THE COURT: How do you propose to get that chart
22 in if you don't get Griffin on the stand?

23 MR. HARTMAN: If I don't get Griffin on the
24 stand?

25 THE COURT: Mr. Sofer said that the government

1 objects to your recalling Griffin, but what -- why would
2 you -- I'm asking Mr. Sofer -- why couldn't -- and this is
3 a very good example, it seems to me, that -- that -- I
4 mean, I'm just trying to think, you've got a chart -- let's
5 say you've got a chart of 18 excerpts, training and
6 contacts, whatever, before you put the chart in, it seems
7 to me you've got to get a foundation laid somehow, and it
8 does seem to me that the only other speaker was
9 Mr. El-Hindi, and as he's absolutely entitled to do, he
10 elected not to take the stand. It seems to me you've to
11 got to get -- got to recall Griffin to prove up those
12 excerpts and then to play them for the jury. And I thought
13 I heard you ten minutes ago say that you would object to
14 them recalling Griffin to the stand.

15 MR. SOFER: Absolutely, Judge. Again, this is
16 not -- I don't think it's the government's problem, is the
17 way I would describe it in one sense. The -- if they want
18 to put in transcripts, we're back to -- again, we're back
19 to this concept of what people understood. And I thought
20 out of the pile of things that we have here is the
21 opportunity for the defense to ask Mr. Griffin, it's
22 exactly why I did not object to the recruiting one that I
23 just put up there. If they want to ask him, didn't you
24 talk about recruiting in another context, I think he's
25 going to concede that. I mean, I think, I think for the

1 most part, the tapes speak for themselves.

2 If, I mean, you have to -- again, you can't talk
3 about this in a vacuum. If there are 18 different examples
4 of training and one of them took place a year before the
5 conspiracy, I don't think that 18th one comes in. I mean,
6 so what. There could be a -- again, if you take up the mob
7 case example, if people are sitting around talking about --
8 or in a drug case example, would probably be more
9 appropriate -- if I think -- and Your Honor may have
10 brought this up -- and you say I need 15 1/2 shirts, when
11 they're talking about a large quantity of cocaine, and it
12 turns out there's also a laundry business involved, then I
13 believe that this is the defense's opportunity to ask about
14 those definitions in terms that are relevant here, and I
15 don't object to that. Again, as long as it's done --

16 THE COURT: I mean, I may, in all candor, be
17 ignorant of something really fundamental, but it's always
18 been my understanding that there's no such thing as a
19 government -- that a party doesn't own a witness. And if
20 the party wants to call a witness called by the other
21 party -- taking the Fifth Amendment out -- let's say, you
22 know, that they're going to call whomever the guy is in
23 Cleland's, and they've subpoenaed the guy at Cleland's.
24 You have them. You learn about the subpoena. You figure
25 it out, you go out and talk to Mr. Cleland. Alternatively,

1 they call a guy at Cleland's in -- that's imaginary on my
2 part -- they call in the case in defense, they subpoenaed
3 him. I think you can stand up at the end of your
4 cross-examination and say Mr. Cleland, Judge, I want
5 Mr. Cleland instructed that he remains under subpoena. On
6 rebuttal, call Mr. Cleland. I don't think they can stand
7 up and say wait a minute, Judge, I'm sorry, I'm confused.

8 MR. SOFER: I'm not suggesting, Your Honor, that
9 we own the witness in that sense and that somebody couldn't
10 call a government witness in the defense case. I think the
11 orderly flow of trial usually dictates that to the extent
12 that during the cross-examination of a witness you can
13 accomplish what you would have during the direct
14 examination of a witness that formerly -- that's what's
15 done. You don't, then, essentially, have all the
16 government witnesses come in and testify and then have them
17 all recalled in the defense case for a certain purposes.

18 I also think, Your Honor, that, again, let's take
19 the training definitions as an example. When, for
20 instance, let's say there are five definitions of training
21 from 2001 to 2002, and then there are a bunch of
22 definitions of training that relate to the conspiracy and
23 then -- and the defense wants to say, well, you know, he
24 was confused or whatever, the witness is really
25 purposefully making this ambiguous so that there's not

1 an -- I just think --

2 THE COURT: There's training at the range,
3 there's training Saturday morning at the soccer field.

4 MR. SOFER: That's right. The issue about what
5 the witness was trying to do, which is, I think, what
6 they're getting at here over and over again, it seems to be
7 what Dr. Shy conclusion was, among other things, and
8 certainly the basis among all his research and testimony in
9 a lot of other cases is that this shows -- Mr. Hartman has
10 said this -- this shows that -- that Griffin was trying to
11 do something.

12 Your Honor's example suggested on
13 cross-examination, it's Griffin trying to do so. That
14 portion of his testimony, that portion of the argument by
15 defense is the proper subject of cross-examination, what
16 was Griffin trying to do. I think I would assume that
17 you'd much rather cross him and direct him there anyway.

18 And all I'm saying, Judge, is simply that,
19 obviously, I don't know fully what the defense is, so I'm
20 not going to sit here -- and so there's no circumstance
21 under which Mr. Griffin could not be recalled.

22 I don't -- I think there are other avenues for
23 getting in the evidence that you're describing. One of
24 them would be as easily as the government's stipulation to
25 say, look, that this conversation took place. You're going

1 to call Mr. Griffin to say that this conversation took
2 place. I don't -- I don't necessarily think that having
3 him called in the defense case is the appropriate way of
4 doing that.

5 THE COURT: I disagree because I think,
6 certainly, with some frequency, counsel in a criminal case
7 will say, Judge, come up to the bench, Judge -- during
8 cross-examination -- like him much to go out outside the
9 scope like the right to recall the witness. Normally, it
10 would be considered okay, go ahead, but I disagree with
11 you, and maybe I'm missing something fundamental, but I
12 don't think there's anything that precludes or prohibits a
13 party that has cross-examined on a subject or set of
14 subjects from then, in a sense, using cross-examination
15 sort of as a predicate, saying, look, jurors, you are
16 using -- when you were talking about training in the
17 afternoon before you went to Cleland's, what were you
18 talking about training? Talking about learning how to
19 shoot. Fine.

20 MR. SOFER: I'm sorry to interrupt, Your Honor,
21 but -- and I think this is -- I think the point I'm trying
22 to make is your -- what we're trying to -- part of the
23 conspiracy charge and part of what's happening is it's --
24 it's a definition and a term. "Training" is a good term as
25 an example. And you have two people, one of them -- and

1 there's sort of a number of ways to figure out what they
2 meant. One is just a substance of what they said. I don't
3 disagree that the substance of what is being said could be
4 brought out later perhaps through Mr. Griffin. Every time
5 I ask Mr. Griffin, though, what he meant by something, Your
6 Honor objected sua sponte or granted the defense objection
7 of a -- occasionally -- I say every time, I'm probably
8 exaggerating -- a number of instances where I asked what
9 you meant by that or more importantly, what did he -- what
10 did he mean when he said --

11 THE COURT: Those I remember objecting to.

12 MR. SOFER: I can go back through the record and
13 look for this, but I think properly what's dangerous here,
14 what I'm -- and this is why I object to what I think is
15 coming. Now we're arguing about something that is in the
16 future. I don't know that it's necessary to do that. But
17 what I objected to is trying to use Mr. Griffin as a
18 surrogate for what it is that the defendant is doing.

19 THE COURT: I agree completely.

20 MR. SOFER: I think that's where -- that's --
21 maybe I may have not articulated it very well. But that is
22 essentially my point, which is, when you call a government
23 witness to bring -- you can bring out the substance of that
24 conversation, but you can't -- you can't manipulate this in
25 a way that ultimately says that, well, when he says

1 training, he thinks something else.

2 THE COURT: I agree with you --

3 MR. SOFER: So --

4 THE COURT: -- but you can create a predicate for
5 then arguing that at the very least, having used the word
6 "training" this way, that way, another way, before and
7 after the crucial set the conversation. I think that they
8 can then argue that the reasonable inference, the way the
9 subject came up in this conversation, the reference is --
10 is a -- ladies and gentlemen -- and Mr. El-Hindi didn't
11 pick up on it.

12 What he understood, on the other hand, the
13 government has to prove beyond a reasonable doubt that
14 there was a meeting of the minds. And that what they were
15 doing when they were talking about training, then, on the
16 afternoon before they went shooting or in a car or wherever
17 it was, they both knew what they were talking about and
18 were talking about inference.

19 So I don't recall saying -- you know, cutting you
20 off, maybe I did. I won't take an oath on that. But keep
21 in mind as well, that if that's where this winds up on
22 cross, it's very fair for you to say, Judge, you let
23 Mr. Hartman ask him that Saturday morning at the soccer
24 field, you were talking -- that Saturday morning at the
25 soccer field, you were talking about the training in the

1 context of Mr. El-Hindi's child learning to play soccer.
2 Well, I'll call your attention to the afternoon when they
3 went shooting, what were you talking about, and you refer
4 to training, talking about teaching him how to shoot.

5 MR. SOFER: Understood, Your Honor.

6 THE COURT: If I did say -- I can't recall that,
7 but I'll take your word for it.

8 MR. SOFER: And I want to look at the record
9 before I state my point either, Judge.

10 THE COURT: But again, I don't -- it seems to me
11 that, number one, the first example you show --
12 technically, when the judge, outside the scope of direct
13 examination, the next is to say -- this isn't completeness,
14 I'm not even sure it's impeachment, depends upon his
15 answer, but I think that it's -- Mr. Hartman or any counsel
16 want to allude to an issue -- when you were talking about
17 training here, you were talking about -- correct, yes, and
18 then come in if there's 17 other conversations in which
19 training has to do with going to cooking school or has to
20 do with basketball or whatever, fine.

21 MR. SOFER: I don't disagree with that, Judge.
22 And again, that's one of the reasons the government
23 conceded that it was a proper avenue for cross-examination.

24 I am -- I continue to be concerned, based on what
25 I have seen and what I think has become, because they're

1 already having questions asked of Mr. Griffin, and so and
2 so didn't pick up on it, did he? And you know, I don't
3 think that's a fair question. I don't think you can -- you
4 can make that argument in summation. You can show the jury
5 here's a transcript that's obvious, take a look at it,
6 ladies and gentlemen, he didn't pick up on it.

7 THE COURT: Yeah, I tend to agree with you, that
8 kind of conclusory, he didn't pick up it, and what did he
9 say after that, it's on the record, mop on down the road.

10 I would tend to agree that's the phrasing you
11 just used, and I think what it was used for is not
12 appropriate. That's argument. And also, what's into
13 Mr. El-Hindi's mind which we have no -- no peephole, as it
14 were.

15 MR. SOFER: And finally, Judge, again, I just ask
16 The Court to keep in mind as we go through this, not just
17 now, but later at some point, we do get close -- closer at
18 least, to this issue of putting in a volume of innocent
19 conversations as a defense to things that are clearly not
20 innocent.

21 I would concede, based on my knowledge of the
22 first -- of the transcript that we put up, that there was:
23 A, there's no charge related to that; B, there's no
24 illegality or no national security illegality necessarily
25 connected to that conversation.

1 And we're not going to argue -- we are not -- I
2 think maybe counsel thought we were coming into the case, I
3 don't know, that somehow this conversation is some
4 nefarious way of recruiting terrorists connected to the
5 case. We're not going to make that argument. I'm just
6 saying at some juncture, if you open this door too wide,
7 you end up with a whole bunch of spurious information that
8 doesn't have anything to do with the case.

9 THE COURT: Again, I agree absolutely with the
10 fact that he was recording for, what, two years.

11 MR. SOFER: More than that, Judge.

12 THE COURT: However -- more than two years. And
13 that the jury will see the equivalent, perhaps, of two
14 weeks worth of recordings. The fact -- it doesn't matter.
15 It's not relevant. It wasn't introduced, it's not
16 evidence.

17 And I agree completely that we cannot sit here
18 and play two-plus years worth of recordings in order to
19 develop the inference that they never agreed to do that
20 which the government agreed. That agreement could have
21 occurred in a single conversation.

22 MR. SOFER: That's right, Judge, and at the very
23 least it wouldn't have occurred within the confines of the
24 indictment. So again, I'm -- I'm telling The Court,
25 we're -- I think we've got to the end of the road to some

1 extent. You -- I wanted to show The Court the outside of
2 where the government is sort of willing to go because I
3 think it's illustrative of something we're going to get to.
4 I didn't mean to start a whole conversation of what's going
5 to happen in the defense case, and I'm really not prepared
6 to go into that in detail.

7 But for cross-examination purposes at least, I'll
8 concede that a conversation five months before the
9 beginning of this conspiracy, under the limited
10 circumstances there, is an appropriate question to ask. I
11 just want us to do it the right way, that's all.

12 MR. HARTMAN: Judge, I think I agree. Again, I
13 agree with the vast majority of what Mr. Sofer is saying
14 with the exception of a couple of things. Number one,
15 we're going to ask The Court for an entrapment instruction.
16 And showing innocent conversation that happens shortly
17 before Mr. Griffin -- in the many, many, many ways that he
18 does -- tries to get Mr. El-Hindi to talk about things, do
19 things, and agree to things is completely proper in --
20 under those circumstances.

21 We're not playing stuff that doesn't mean
22 anything. The last thing we want to do is bore the jury.
23 We're going to play as little as we can to still show what
24 we want to show. But the first recording -- there's a
25 recording very early on in 2003, and Mr. Griffin says to

1 Mr. El-Hindi almost out of the blue, "I've really become
2 more militant, I wish I was in Iraq running a training
3 camp." I mean, there's -- there's no predicate
4 conversation by Mr. El-Hindi at all. And he spent three
5 years doing this. And I think it's appropriate for the
6 jury to understand exactly what happened.

7 THE COURT: And I would agree that that would be
8 so, certainly in your case.

9 MR. HARTMAN: Right.

10 THE COURT: And all I'm talking about is getting
11 through the rest of the week, okay.

12 MR. HARTMAN: Yeah, but can I get some
13 conversation about the fact that I'm going to be able to
14 call Mr. Griffin in our case in chief?

15 THE COURT: I -- I mean, if the government has
16 some rule of evidence or procedure that would preclude
17 that, let me know. But I think, certainly, the suggestion
18 that defense would somehow be precluded from calling a
19 government witness or precluded from examining that
20 witness, and under the hostile witness provision, which I
21 think probably would apply, but I'm not ruling on that, at
22 least in terms of the ability to lead and impeach, that
23 somehow the fact that the defendant had touched upon
24 certain subjects but not exhausted them on cross, we have a
25 preclusive -- I'm totally unfamiliar with that, maybe it's

1 just the back waters of the Maumee.

2 MR. SOFER: Judge, I think we'll certainly do the
3 research with respect -- like with a lot of things. I
4 think sort of depends on what's happened in the trial up
5 until this point and what the purposes of recalling the
6 witness are. As you say, we're on the first witness of a
7 multi-witness trial trying to get through tomorrow. I'm
8 not -- I am not adequately prepared to fully make that
9 argument.

10 THE COURT: I'm just letting you know that that
11 caught my attention when you --

12 MR. SOFER: Understood.

13 THE COURT: -- when you mentioned that, and I was
14 going to say if you're counting on me to say, okay, you're
15 right, Mr. Sofer, tough luck, Mr. Hartman, you know, okay.
16 It's contrary to my understanding. Of course, ultimately,
17 it's the -- it's the trial process equivalent 403, the rule
18 cross mode and conduct of the examination, so --

19 MR. SOFER: Understood, Judge.

20 THE COURT: But anyway, so where does that leave
21 us with all the transcripts?

22 MR. SOFER: We were on number three. All -- I'm
23 going to try to move this along much faster. I'm going to
24 walk over to counsel see if it's one we agreed on, if it's
25 not, I'll put it up.

1 Maybe the better way to do this, Judge, is not to
2 have me try to say what defense counsel wants to do in
3 their cross, but sit down and have them explain which of
4 these tapes they're looking to play --

5 THE COURT: Okay.

6 MR. SOFER: -- because I think that would be, I
7 think, the more appropriate way of doing it.

8 MR. BOSS: Judge, when we departed the U.S.
9 attorney's office yesterday, it was my distinct impression
10 we had come to an agreement about element, if not all of
11 these various segments that we had provided. We are not
12 intending to simply carte blanche attempt to play the
13 recordings. We are intending to go through and examine
14 Mr. Griffin. If Mr. Griffin is not willing to concede that
15 certain things were said that were on the tape, then of
16 course we would seek to play the recording.

17 THE COURT: And I -- I anticipate that that will
18 be a moot issue because once you throw in the transcript,
19 after he either denies having said something, are far more
20 likely. It seems to me say, I can't recall and say, read
21 it, have you read it? Yes. And would you just read it for
22 the jury, you were asked this and what did you say. I said
23 that. Thank you very much.

24 Now turning your attention to, also on the
25 subject of X, do you recall on or about whatever the

1 conversation with whomever having said something to the
2 effect. And you don't have to accept, by the way, that if
3 you say so. Answer, okay.

4 I think the witness has to say yes, no, or I
5 don't remember. And if he says, yes, assuming he read it
6 verbatim, that's fine. If he says, no, or don't remember,
7 you show it to him. I think that's the way it works.

8 MR. SOFER: That's basically all we've been
9 asking for throughout this, Judge.

10 THE COURT: Yeah. If I have anything to say
11 about it, that's what I hope it --

12 MR. BOSS: We're attempting at this moment to
13 compile for The Court a list of dates of the recordings
14 that we felt it was important to attempt to play. I
15 believe that we discussed this with the government for the
16 most part.

17 MR. SOFER: We did. And I think we came up
18 with -- I just want to clarify and make sure that we -- I
19 think we agreed on four -- was the -- we agreed on
20 yesterday or that counsel was unable to discuss a couple of
21 these which they were still working with, but I think we
22 agreed on four; two videos I referred to previously and the
23 government said -- even though my younger days, we might
24 have thought about this -- I think we concede that two of
25 these, even though the rule of completeness time has ended,

1 and I don't know that this really is the rule of
2 completeness anyway -- I'm getting old and tired, Judge --
3 and we said we'd let them play two more, as long as they
4 then abided by the government's concerns of that rule of
5 completeness. I think we ended up with four, and I just
6 want to confirm that's where we are at, and we can turn to
7 the next group of issues, Judge.

8 MR. BOSS: I don't know that our list is exactly
9 four, but there was -- they've already been played a number
10 of recordings by the government. It's -- it's my
11 impression that as a part of the evidence, there would be
12 little evidence reason not to commence the ability -- they
13 have played with our ability to punctuate the questions to
14 the witness.

15 THE COURT: As long as that was fairly broad
16 scope with the appropriate cross-examination, I would
17 agree. I mean, obviously, the worst cross-examination is
18 the one who gets the witness to repeat his testimony. You
19 know that. That's not what you're going to be about.

20 MR. BOSS: I hope not.

21 MR. HARTMAN: I think -- I think there were --
22 there were the two videos, and then there were about four
23 or five recordings, most of which we said, I mean, we
24 have -- I don't think he's going to get on the stand and
25 make the denials that are going to allow us to play it. So

1 I don't think it's going to be an issue.

2 THE COURT: I don't either. As far as I can tell
3 so far, you have -- have to flat out caught him in a dead
4 bang, oh, no, I never said that, absolutely not. Read
5 this. Were you under oath, not under oath, I guess, but --

6 MR. SOFER: And I think you can watch the witness
7 testify. He's -- when you have two, three years of tapes,
8 I think he's appropriately and honestly explained what he
9 remembers and what he doesn't. And I think the tapes are
10 the tapes, Judge.

11 THE COURT: And I can't remember having sua
12 sponte objected and say you can't ask him what he meant and
13 say -- my point is, that was a week ago, okay, and I can't
14 remember. I understand all that.

15 So what -- are all -- is all of this anticipatory
16 worst case set of squabbles that we've been talking about?

17 MR. HARTMAN: Yes. I don't think -- I really
18 don't -- I don't expect many problems and not many
19 sidebars.

20 THE COURT: If you can take the end from away
21 from the word "many," that might be as perfect.

22 MR. HARTMAN: We'll probably have a couple of
23 disputes.

24 THE COURT: Do you know what they are?

25 MR. HARTMAN: No, I don't.

1 THE COURT: All right. So what's next?

2 MR. SOFER: Well, I think if -- we're now told
3 Mr. Herdman will be here at 4:00, and the only things that
4 are left are the stipulations and the experts. They are
5 interlinked.

6 THE COURT: Right.

7 MR. SOFER: Counsel just got the stipulations, so
8 I would expect them necessarily to have turned around and
9 give us their position on it, although that would be --
10 you'll notice, Your Honor, that a substantial preamble has
11 been placed in front which we'd ask the court to read.
12 That was something that the Justice Department was
13 specifically interested in making sure whatever we agreed
14 to in this case is not thrown back in the government's case
15 in some other case in the future. And in particular, this
16 relates to the -- you can imagine -- we're actually
17 defining whole religions, and paragraph that has two or
18 three sentences in it. And I think those concerns are --
19 are legitimate in some cases. And so I don't know if
20 counsel's gotten to look at least at the preamble, they're
21 still -- they're still are called "stipulations," but
22 they're stipulations that are very carefully limited and
23 the record should reflect that we can only do this if
24 they're very carefully limited to this case and only this
25 case. And so I don't -- again, we can have a discussion

1 with that, what counsel thinks about that, but that's
2 certainly government's intention of putting that preamble
3 in.

4 And then we did make some modifications to some.
5 If anything, I think for the most part we compressed, not
6 added, and I don't know if counsel have objections or
7 issues that they want to discuss at this point.

8 THE COURT: Well, what if -- what if we -- I
9 recess until Mr. Herdman's here. I'll get to reading the
10 Kohlmann stuff, which I haven't done yet. You can either
11 take a break while they look at it or you can --

12 Mr. Teresinski, did you do the stipulations, or
13 who?

14 MR. TERESINSKI: Your Honor, yes, I -- I had --
15 back in Washington. I can speak with both counsel.

16 THE COURT: Yeah, if you can just say, look,
17 guys, here are the changes and this is why we did them.

18 MR. TERESINSKI: Right.

19 THE COURT: And my only question is, is the
20 government insistent on my reading that, do represent
21 policy positions of the U.S. government to the jurors or
22 simply making an affirmative ruling on that effect on the
23 record?

24 MR. SOFER: No. We'd ask that in addition to
25 the -- to ruling that this is an acceptable way to go

1 forward in terms of the process of the trial.

2 THE COURT: In this case? An acceptable way to
3 me in this case? Because how I'm trying to contain this
4 case as narrowly as I can to trial of the element of the
5 charges brought against the defendants and in due course,
6 in fact, one or more of them advances an entrapment defense
7 to contain the case within the confines of that defense and
8 not let it kind of spill over into all kinds of other areas
9 that may have some ancillary significance, undeniable
10 significance, but I consider it to be ancillary and outside
11 the scope of this criminal prosecution.

12 MR. SOFER: And that's -- I think the
13 government's been fairly consistent about that as well.

14 THE COURT: I'm just saying, I don't have a
15 problem reading it. It seems -- but that's the price the
16 government wants to move things along, and if it's
17 acceptable to the defendants, it certainly is fine with me.

18 MR. SOFER: Let me just comment on one thing:
19 You mentioned an entrapment defense, this is the first
20 time --

21 THE COURT: I noticed that.

22 MR. SOFER: -- has announced their intention to
23 proceed with an entrapment defense. I would just note,
24 Your Honor, that with respect to that defendant then -- and
25 we're talking about Mr. El-Hindi here -- essentially, I

1 believe the case law supports this -- I'm going to brutally
2 simplify this -- essentially throws rule 404(b) out the
3 window, and it's a free-for-all in terms of what else the
4 government might have. As I say, I'm butchering this to
5 some extent to show predisposition.

6 I will tell you this, Judge, Mr. El-Hindi, in
7 particular of all of these defendants, has engaged in -- in
8 a number of different activities. This should be nothing
9 new to defense counsel or The Court, but it's something
10 that counsel's mentioned over and over again, he's trying
11 to make money a lot of different ways, trying to do a lot
12 of things a lot of different ways. We're aware of some of
13 the ways he's done that, and I believe that, that as of
14 this moment, the government should be free to not only
15 present that evidence, but present it in a way that
16 specifically undermines an entrapment defense.

17 THE COURT: Wouldn't it be procedurally tidier to
18 wait until they've rested at whatever point that is and
19 then to come back and enjoin the issue in that way, because
20 otherwise the jury's going to think what in the world --

21 MR. SOFER: I don't necessarily disagree with
22 that in terms of when, and again, I -- we've obviously
23 anticipated this issue to some extent. It's another issue
24 that I'd like a little more time to explore in terms of the
25 specifics of it. But I do know enough to know because I

1 have -- I have litigated these issues in the past, that
2 when an entrapment defense is interposed, it does change
3 the nature of what was admissible, not necessarily when
4 it's admissible, per se, but certainly what is ultimately
5 admissible.

6 THE COURT: And also I don't think I've ever
7 tried an entrapment case, I'm pretty sure I haven't. It
8 requires the defendants to admit commission of acts charged
9 or no? What -- what's that all about?

10 MR. SOFER: I -- I would like to take a longer
11 look at the law here in the Sixth Circuit. There are --
12 they're usually -- there are two elements to -- two major
13 elements to the entrapment defense, as I understand it.
14 One is whether the particular defendant was induced by
15 government action and then the next concept is whether --
16 it depends -- depends -- you've got to look at the
17 instructions -- we've looked at it -- for someone who
18 specializes in this moment, not me obviously. And the next
19 question is, did it overbear the defendant's will or was he
20 predisposed to commit this crime anyway. And those are the
21 two big pieces of it.

22 I don't think, and I don't want -- I want to be
23 clear, I don't know this for certain, but I don't think it
24 requires a defendant to admit that he's committed the
25 crime. Somebody said that one day. That's not my

1 understanding of the law.

2 MR. CZARNECKI: I think it used to, it doesn't
3 anymore.

4 MR. HARTMAN: In state court it does.

5 THE COURT: I will try to be apt and eager,
6 willing and attentive to --

7 MR. HARTMAN: I also.

8 THE COURT: -- or any one of those.

9 MR. HARTMAN: I also would remind The Court that
10 with -- he did talk about this before and you did tell the
11 government that if we got to the end of our case and
12 rested, and then all of a sudden ask for it, you'd let them
13 reopen to do -- and we're aware of that. And we haven't
14 made a final determination anyway.

15 MR. SOFER: Wait a second. I understood
16 counsel -- maybe I'm wrong to have just said today -- that
17 they're going to ask The Court.

18 THE COURT: That's -- my two ears heard as well.

19 MR. HARTMAN: I meant to say we may ask The
20 Court. I don't believe a notice is required, quite
21 frankly.

22 THE COURT: I agree. And if I misspoke, that's
23 fine. I think that it's at least the government's on
24 notice that that's a fair -- which probably is not much
25 news at all.

1 Okay.

2 MR. HELMICK: Judge, the matter that we discussed
3 in camera last Friday, might we have a brief discussion
4 about that now?

5 THE COURT: Who all is present in the courtroom?
6 That young man is a St. John's student, he's okay.

7 MR. SOFER: Everybody here is with the
8 government.

9 THE COURT: Then why don't we just talk about it
10 here.

11 MR. HARTMAN: Is there a feed to the media room?

12 THE COURT: No.

13 MR. HARTMAN: Do you want me to tell the deputy
14 to close --

15 THE COURT: If somebody walks in, we'll stop
16 them. I don't -- we can leave the doors open.

17 MR. HELMICK: Your Honor, it's my understanding
18 from what the government said to The Court and the parties
19 by way of e-mail that the government is suggesting that The
20 Court handle the matter with just a general curative
21 instruction, I guess.

22 THE COURT: I'm disinclined to do that. I'm
23 inclined to do -- I will do what I suggested last week. I
24 just think it's too risky in terms of waking up in two
25 years and being told you knew you had -- you had the

1 opportunity. There was nothing urgent or compelling about
2 times when the jury was in the middle of deliberations and
3 this came up during recess between the time they reached
4 the verdict and coming back into court, you know. It's
5 very early on in trial, and I do propose to -- I propose to
6 conduct the inquiry on my own, and make it very brief and
7 limited.

8 If you hear -- did you hear a conversation -- you
9 were in the car and somebody approached the car and asked
10 an inquiry -- or in the vicinity of the car and asked one
11 of the deputy marshals something, did you hear that
12 question? That's what -- what did you hear? What happened
13 after that -- the conversation, yes, and anything that you
14 heard or said or anyone else heard or said in any way
15 affect your judgment.

16 You understand that -- you understand you
17 shouldn't speculate whether one or more of the defendants
18 is in custody and that because if he is, that's -- doesn't
19 signify anything and certainly does not affect the
20 presumption of innocence with which you must cloak him
21 throughout these proceedings. And to do so would be
22 unfair. And people say, yes, I understand it.

23 I think we've already seen one of the jurors -- I
24 think the compelling candor with which she responds to
25 things -- and you'd be surprised if the other one -- which

1 I will refrain from mentioning at this time -- I'd be
2 surprised if she didn't respond.

3 I think we have a very good jury. I think we
4 have a jury that understands and is honest with The Court
5 and understands with counsel and understands how important
6 that is, so -- but that's how I propose to handle it.

7 MR. HELMICK: Judge, I assume, tentatively, that
8 we're all certainly hoping this did not happen, but that
9 you would also ask whether or not they discussed it with
10 anyone outside the --

11 THE COURT: I'll try to remember that.

12 MR. HELMICK: -- four jurors as well. Obviously,
13 we hope that's not the case, but to the event they
14 discussed it with anyone else.

15 The other thing, Judge, is we'd like The Court to
16 consider -- at least as part of your general instruction --
17 afterwards, you're not to speculate and so forth, maybe
18 something to the effect of, in fact, if you were to
19 speculate, you might, in fact, be wrong --

20 THE COURT: Okay.

21 MR. HELMICK: -- in this case or words to that
22 effect. Otherwise, I think it's kind of unfair to
23 Mr. Masloun.

24 THE COURT: Let me do this: If you folks want to
25 e-mail me a little bullet point sort of topic, just one- or

1 two-word topic list, I will consider it. I'll make it a
2 part of the record under seal, and I will consider it. But
3 that's an excellent point. And there's one else that was
4 made.

5 MR. SOFER: I think I had suggested, Your Honor,
6 that it might -- since it's not clear on the issue, you can
7 tell the jurors that there are a lot of defendants --

8 THE COURT: Yeah, that's -- there are other
9 defendants in and out of this building, and you shouldn't
10 presume that the reference was to anybody here. You
11 understand that? I mean, it's -- just a little -- send it
12 to me this evening, so I get a chance to look at that time,
13 and I'll try to put something like that. I'll try to.

14 U.S. MARSHALL: Judge, I would say actually the
15 other day, the jury was on a break, and I was going to
16 Judge Katz's courtroom and I had a prisoner with me, so I
17 don't think -- it's a courthouse, there's other judges in
18 the courthouse and the jury. So I went to Judge Katz's
19 courtroom, and I can tell from my experience even as a
20 deputy marshal, I've been to other offices and done trials,
21 I did a large scale trial in Miami, and the defendants --
22 it was a violent gang and they were actually in ankle irons
23 during the entire trial. And they brought that to the
24 juror's attention to include -- the defense did -- and said
25 basically what the judge said, you shouldn't draw any

1 inferences, you know, it's a issue and everybody knows
2 about bonds and --

3 THE COURT: Thank you.

4 MR. HELMICK: Judge, there was also the matter of
5 Mr. Masloun's waiver of his presence last Friday, and you
6 asked us to remind you to put that on the record. I don't
7 know if you'd like to inquire of him briefly now or not.

8 THE COURT: Mr. Masloun, you know we had a number
9 of matters to tend to on Friday?

10 THE DEFENDANT: Yes.

11 THE COURT: And you weren't here?

12 THE DEFENDANT: Yes.

13 THE COURT: And do you know you had the absolute
14 right to be here?

15 THE DEFENDANT: Yes.

16 THE COURT: And did you have a chance to talk to
17 your lawyers about whether or not you would be here before
18 we started on Friday?

19 THE DEFENDANT: Yes.

20 THE COURT: And was it your decision upon talking
21 with them to tend to other matters rather than coming to
22 court?

23 THE DEFENDANT: Yes, Judge.

24 THE COURT: Nobody made any threats or promises
25 to you?

1 THE DEFENDANT: No.

2 THE COURT: Very good. All right.

3 Well, let's --

4 MR. HARTMAN: Judge, if I may, one more quick
5 thing, I know that the agent, whoever made the comment,
6 wasn't somebody who's been in the courtroom, I just want to
7 confirm that that person's not on the government's witness
8 list?

9 MR. SOFER: I'll have to take a look at our
10 witness list, but I would be surprised if he was. My
11 understanding is, he's relatively new here in town, and --
12 give me one second. We don't, as we sit here, think that
13 he's related to the case in any way, shape, or form.

14 THE COURT: Just check it. I would have a
15 problem if he were to be called as a witness. So just to
16 be -- I suppose he could be. There's technically no
17 reason, but it looks like that's not a problem. We can
18 hope for small --

19 Okay. Why don't you guys talk about the
20 stipulations and whatever else you have to talk about. And
21 I'm going to go back and read -- the thing is, let me -- I
22 think the problem I had, I was told in the e-mail that sent
23 this to me, there's a reference to the highlighted portions
24 and in the text of the report, I didn't see any
25 highlighted -- maybe in the transmission --

1 MR. SOFER: Well, Judge, I had -- I'll show them
2 to defense counsel with me, what I believe are those
3 highlighted portions --

4 THE COURT: Why don't you give it to them and
5 give it to me?

6 MR. SOFER: I think, also, came with that, is a
7 particular page, I'm not sure, a web page, did you get
8 that?

9 THE COURT: Yeah, that I couldn't read.

10 MR. SOFER: That you could not read at all
11 because it's in Arabic?

12 THE COURT: Yes.

13 MR. SOFER: The report is not in Arabic, and I do
14 think I have a highlighted section.

15 THE COURT: Good. Why don't you show it to them?

16 MR. SOFER: And I would note, Your Honor, once
17 again, that this, if The Court is going to allow the
18 testimony of the defense witnesses, I don't think you can
19 make the decision about Mr. Kohlmann's testimony in a
20 vacuum. Essentially, one is connected.

21 THE COURT: I understand that. And most of the
22 way through an opinion with regard to the defense experts.
23 That's exactly how I was -- but when I picked up what had
24 been sent to me, I didn't see anything that's highlighted.

25 MR. SOFER: I have the highlighted versions. I

1 just ask that -- that if Mr. Herdman has further
2 highlighted versions with him, Your Honor, understand that
3 this is what I brought to court is what I understood, but
4 they came from Mr. Herdman. And he knows better than I
5 exactly what he highlighted, but I'm fairly certain this is
6 the final version.

7 Judge, unless you say otherwise, we're going ask
8 our audio visual person to take our computer and go back,
9 given the fact that we've appeared to have resolved in
10 other pile of information. So I'm going to let him go,
11 with your permission.

12 THE COURT: Good. Thanks.

13 How disruptive would it be if I were to adjourn
14 at 2:00 on Thursday? There's a meeting in Cleveland that I
15 really ought to go to at 4:00.

16 MR. SOFER: Are we -- that's something we can
17 discuss also, Judge. It would be helpful for the
18 government to understand when we need to be ready with our
19 next, either, redirect -- redirect of Mr. Griffin, and also
20 possibly calling another witness. Are we adjourning --
21 tomorrow we're going to have to deal with a juror issue in
22 the morning.

23 THE COURT: Right.

24 MR. SOFER: That's going to take an hour or so
25 perhaps.

1 THE COURT: I hope a half hour.

2 MR. SOFER: We no longer have a full day
3 tomorrow; is that correct?

4 THE COURT: No, we do. I may adjourn around
5 4:00. Probably wouldn't be before 4:00. The funeral home
6 and so forth out in Pemberville is about a half hour. The
7 visitation is from 3:00 to 7:00, and the funeral is at
8 7:00, so we may even go until 4:30.

9 MR. SOFER: So almost a full day tomorrow, your
10 Honor. Suggesting 2:00 on Thursday, perhaps, and Friday
11 would be another full day?

12 THE COURT: Yeah, and also the one thing about
13 tomorrow -- let me see, Wednesday -- full day tomorrow.
14 Wednesday, I'm doing naturalization in the noon hour, so
15 I'll adjourn probably about a quarter -- no, no, no, forget
16 that. I'm in the wrong week. Tomorrow is a full day.
17 Wednesday from about 2:15 to 2:30 time, we'll take our
18 mid-afternoon break. The director of the marshal service
19 is coming from Cleveland, and I'm going to be participating
20 with that. Thursday, I have that 4:00 meeting, but I also
21 have a Law Day luncheon. So -- and Friday, I'm going out
22 of town at some point. I can't remember -- no. I'll find
23 out when I'm going out of town. I think I've got about a
24 6:00 or 6:30 flight, so I'll want to leave about 4:00 on
25 Friday.

1 MR. SOFER: Judge, I guess the question is --

2 THE COURT: Let me say this: We have our -- I'm
3 sorry, our Law Day luncheon at the bar association is at
4 noon. That always runs until about 1:30, and then if I'm
5 going to go to Cleveland, I should leave about 2:00. So
6 maybe what we should do is do a half day on Thursday unless
7 that is a serious problematic for everybody.

8 MR. BOSS: Half day Thursday, you say, Judge?

9 THE COURT: Yeah. Does that cause --

10 MR. SOFER: From talking to Mr. Boss, I am of the
11 impression that he's looking at sort of two, two-and-a-half
12 full days on cross, somewhere in that neighborhood.

13 MR. BOSS: Probably.

14 THE COURT: In other words, this week you should
15 be done, right?

16 MR. HARTMAN: Yes.

17 MR. SOFER: I'm just trying to figure out, we're
18 going to want -- I don't know what Your Honor will do,
19 I'm -- certainly, in many courts where the judge says,
20 okay, redirect the witness now or call your next witness.

21 THE COURT: And but, but, but, but is not a good
22 answer. We'll --

23 MR. SOFER: Wasn't a good answer when I tried
24 occasionally.

25 THE COURT: Let's see how things go. Perhaps the

1 thing we should shoot for is try to finish Griffin this
2 week, if we can. And if we get done, if we get done with
3 Griffin this week, you'd still be more or less ahead of the
4 timetable or on the timetable.

5 MR. SOFER: Oh, yes.

6 THE COURT: Why don't we concentrate on doing
7 Griffin this week, and then your next witness why don't we
8 start next Tuesday?

9 MR. SOFER: My issue is simply --

10 THE COURT: Is that okay?

11 MR. SOFER: I'd like a little bit of time. We'll
12 be prepared -- Agent Coats is likely it be our next
13 witness. We're ready to call him right now. I'm just
14 being facetious about that.

15 THE COURT: You've previously been sworn, haven't
16 you, Agent? Since the jury isn't here, we'll just go --

17 MR. SOFER: We can read it back. The -- I'm
18 going to want a little bit of time between cross and
19 redirect to have our witness back so that we can talk to
20 him a little bit.

21 THE COURT: With any luck, maybe Mr. Boss will
22 finish by noon on Thursday and that should give you time.

23 MR. SOFER: That would be perfect.

24 THE COURT: And then we'll just have to wait and
25 see. He won't be done before then. If he does, we'll just

1 adjourn then with whatever we've got.

2 Do you think you can get done by noon on
3 Thursday?

4 MR. BOSS: I hope so, Judge, I'm not sure.

5 MR. IVEY: Your Honor, what Mr. Sofer said is
6 what is the court's rules, if any, with respect to recross?
7 I mean, I don't want to this Ping-Pong game going on too
8 long, but I just want to know what we should be expecting.

9 THE COURT: It's generally my practice, if you
10 have something that's within the scope of redirect, it's
11 supposed to, at some point, come to a point, okay, where
12 there are no more questions that can be asked, but I do not
13 say redirect, end of it, go home, call your next witness.
14 I will say any redirect and any re, re, re-- redirect and
15 any re, re, re-- but at some point, the jury sits there and
16 you've lost them. That's a lot more dangerous for you than
17 it is for me.

18 MR. SOFER: Understood, Judge. And we'll do what
19 we can to minimize.

20 THE COURT: I understand, but why don't we plan
21 to -- we'll plan to go until shortly before noon on
22 Thursday, and then I will be able to tend to my obligations
23 in Cleveland. Thank you.

24 (A brief recess was taken.)

25 THE COURT: Where are you with the

1 stipulations/definitions?

2 MR. TERESINSKI: Your Honor, I think if I can
3 speak for both counsel that we talked about things they
4 would like to illuminate about it, I guess, overnight.
5 We're not -- I think we're in decent shape in explaining
6 why some of the changes were made and the like, and so I
7 think I'm going to wait to hear back from them overnight
8 and then tomorrow. I think we'll -- hopefully, we'll put
9 this to rest. But again, a lot of it -- some of it enters
10 upon, I think, some of the things that will come out of the
11 discussion about the experts.

12 MR. SOFER: Mr. Helmick brought up an issue which
13 I think is a good one. We'd like to think about it a
14 little, too, but assuming that there is an agreement
15 amongst all parties on how to get this to the jury and then
16 how they should be digesting it, if you will, Mr. Helmick
17 brought up a good point: If you just give it to them, put
18 it in their books, they don't necessarily get a chance to
19 really read through it here in the courtroom certainly. So
20 I don't know if The Court could suggest a way of dealing
21 with it or we might be able to say here are these
22 definitions, we could retire for a while and at least read
23 them.

24 THE COURT: What if we gave them to them on
25 Thursday close of business since -- suggested that they

1 take an hour to do homework, shouldn't discuss them, but
2 they should simply each read them carefully.

3 MR. SOFER: We would send them home?

4 THE COURT: No, no, no, I mean here.

5 MR. SOFER: Here, work?

6 THE COURT: Here, work.

7 MR. SOFER: Understood.

8 THE COURT: Something -- but I think that's a
9 good point. That might be -- or even -- I'll talk with
10 them and what I may do is say, ladies and gentlemen, we may
11 be giving you -- about however many the number is -- of
12 definitions that the parties have stipulated as they agree
13 apply to various terms in this case, and they are to be
14 used in this case, and will probably take you about a half
15 hour to an hour to read them. I wouldn't want you
16 discussing them, and I can't let you take them home, but
17 you know, you tell me when would be a good time, for use in
18 the jury room. Okay? I didn't -- do you mind if I keep
19 your --

20 MR. HERDMAN: I thought I had E-mailed that.

21 THE COURT: You did, but at least mine didn't --
22 I looked and I didn't see highlighting.

23 MR. HERDMAN: I apologize. It works on mine. I
24 don't know if I have a different version of .pdf.

25 THE COURT: My question is, do you -- does some

1 of these -- does some of this material relate to videos
2 that we're not seeing or will be seen by the juror, are
3 they all videos that the jury either has or will see?

4 MR. HERDMAN: Some of the highlighted portions do
5 relate to videos that were not played and will not be
6 played for the jurors. And the reason that we had proposed
7 those particular discussions and not necessarily
8 demonstration of those videos is that -- at least I was
9 cognizant of the fact that Mr. Ivy was cross-examining
10 Mr. Griffin, there was much made of the training aspect of
11 some of these videos. And all along, Your Honor, the
12 government has asserted that these videos played a number
13 of different roles. They're used as propaganda to recruit
14 individuals, they're used as propaganda in order to acquire
15 certain support from other people who can't actively
16 participate themselves, and finally, they're used as actual
17 training devices for those individuals who cannot go to a
18 stand-alone physical camp somewhere. And the fact of the
19 matter is that Mr. Amawi had a tremendous -- tremendous
20 amount of this material in his possession. And we're not
21 trying to introduce any evidence of the size of that
22 collection or any evidence of maybe Mr. -- Mr. Kohlmann's
23 opinion as to what the size of that collection would
24 indicate, but what we do think is important is that some of
25 these materials -- for instance, there are three that I can

1 think of off the top of my head that relate to Al-Qaeda and
2 Saudi Arabia. And I know one of them is called "Martyrs of
3 the Confrontations." This is a 45 minute -- literally, a
4 feature-length film which includes a lecture by leader of
5 Al-Qaeda in Saudi Arabia to assemblage of trainees where he
6 lectures about the most important aspects of certain
7 operations that should be undertaken.

8 Now, we would never seek to play a 45-minute
9 video for this jury; however, I do think to the extent that
10 Mr. Ivy's already made some issue out of training quality
11 of some of these videos -- these are videos, by the way,
12 which most of which were provided to Darren Griffin in one
13 form or another. That it is important that the government
14 be allowed to discuss, not necessarily to show, but at
15 least to discuss, say, on one disc that was given to
16 Mr. Griffin, there were 20 videos that showed various forms
17 of rocket impacts. There was one, 45-minute video that he
18 showed a lecture at a camp, a Al-Qaeda -- there were 15
19 videos that depicted sniper attacks or IED attacks.

20 And I don't know that Mr. Kohlmann necessarily is
21 the person that has to testify to that. However, I do
22 think that there are certain videos that have particular
23 significance because of what they are about. And those
24 very few examples that I've just given to Your Honor, the
25 "Martyrs of the Confrontation," -- and I forget what the

1 other one is, it might be the Battle of Badr al-Riyadh.
2 Those are very discreet examples of the -- and by no means
3 do they make up the bulk of what we would propose
4 Mr. Kohlmann would testify to at this stage, in an
5 immediate sense.

6 I put this item in there because I thought this
7 was right after Mr. Ivy finishes his cross-examination of
8 Mr. Griffin, and I thought they might be important,
9 something that the government will view.

10 THE COURT: What's the connection again?

11 MR. HERDMAN: The connection between?

12 THE COURT: Mr. Ivy and how many --

13 MR. HERDMAN: Mr. Ivy, if you'll remember, Your
14 Honor, he played certain videos that were shown to the
15 jury, and the one I'm thinking of in particular starts off
16 with a map of the United States, and there are a number of
17 Christian crosses that are all across the map. And then
18 the United States blows up.

19 Well, actually in that video, that video depicts
20 the wills and the last testaments of certain operatives of
21 Al-Qaeda and Saudi Arabia immediately prior to them
22 engaging in an Operation Riyadh where they attacked an
23 embassy compound. I believe it was in 2003. And that's
24 actually -- one is out of the series of videos that were
25 produced by Al-Qaeda and Saudi Arabia. We didn't play the

1 entire video for the jury mostly because of the part of the
2 video that was playing for Mr. Griffin was condensed. It
3 was only a couple minutes, but the entire video is about 15
4 to 16 minutes. And it does have a real significance.

5 By the way, this video was provided to
6 Mr. Griffin by Mr. Amawi. It does have real significance
7 in terms of the actual content.

8 THE COURT: Okay. As to that, I'm inclined to
9 let you play it. I mean, the reason on -- one of the
10 problems I have is the fact that it was downloaded doesn't
11 mean that it was ever viewed. And the same, quite
12 candidly, with the list of favorites. I probably have 50,
13 40 different blogs and newspapers, the same number of which
14 routinely I look at two or three. I mean, lots of them
15 that I've seen at some point, bookmarked it, add it to my
16 list, and never looked at it again. And -- and so absent
17 some basis for believing that Mr. Amawi, in fact, looked at
18 this, I just don't -- it's a "so what."

19 I mean, the other analogy I thought of is I will
20 often have ten or 15 or 20 books in the library. I mean, I
21 may at some point get around to reading three or four of
22 them and take the rest back which has created an inference,
23 because I had the book out maybe two or three months, that
24 I read it.

25 But as I say, it's -- there's clearly evidence

1 that a segment of that video was shown. And I would much
2 prefer to let the jury see it. It is what it is and you
3 can argue whatever inference it is. I think there's an
4 adequate basis in the record to conclude that he gave a
5 copy to Mr. Griffin, more likely than not knew what was in
6 it, therefore, he saw it and that's fine.

7 But with some of this other stuff -- and the
8 other thing -- and that leads to the second issue -- and
9 I'm sorry to jump around -- so there's a list of favorites,
10 there are videos not yet shown to the jury to basis to
11 whether Mr. Amawi, in fact, viewed them. And then there is
12 the -- oh, and as to any of the videos, why do we need
13 Mr. Kohlmann to tell us?

14 Again, this is the same problem we've had in the
15 past, the original source and origin. I mean, again, I
16 have no problem with an Arabic translation where it's in
17 Arabic. I have no problem with the jury seeing and having
18 a translation, either scroll or read while it's being
19 viewed, even if it's lengthy and it's gruesome. But absent
20 the connection -- absent the basis for believing that
21 Mr. Amawi viewed them and therefore knew their contents or
22 other evidence of knowledge of contents talking about a
23 particular video. We may not have other evidence playing,
24 but nonetheless, if we talk about something that you are
25 familiar with its contents. So maybe three different --

1 MR. HERDMAN: And as to much of what Your Honor
2 just said, we don't disagree with you, we wouldn't be
3 proffering Evan Kohlmann as somebody to come in and testify
4 about videos that were either in Mr. Amawi's possession or
5 were handed off to Mr. Griffin. In fact, I think at the
6 very beginning as to those three things that I can think of
7 off the top of my head, constitute a very small percentage
8 of these smaller percentage of limited testimony that we're
9 proffering as to Mr. Kohlmann right now, your Honor.

10 THE COURT: Maybe -- what I'm trying to say is, I
11 don't think it would be appropriate that Mr. Kohlmann
12 essentially provide a catalog absent, you know, proof that
13 Mr. -- Mr. Amawi was aware of the contents. And if he is,
14 then let's go ahead and show the video itself and a
15 translation, because as I think I've indicated earlier, I
16 don't think the fact that something is initially produced
17 by Al-Qaeda, Al-Qaeda in Iraq, whatever it is, has any
18 particular significance, because I'm persuaded, in light of
19 Mr. Kohlmann's testimony, that it's at least as likely as
20 not that this stuff was contained in some other source.

21 And because, if I recall his testimony -- I think
22 I do pretty clearly -- although he described it as being
23 quite difficult, it was apparent to me, based upon his
24 testimony -- which is the only basis I have for knowing
25 anything about the difficulty -- because somebody that logs

1 in every couple days or two or three days to check certain
2 websites could probably get this stuff. And it's not so
3 even he is sent that I think any particular -- the jury
4 should hear or any inference could be drawn with the
5 difficulty accessing this, much less the size of the
6 collection.

7 So I just want to say where it's --
8 Mr. Kohlmann's testimony is either appropriate or necessary
9 to communicate to the jury, it can be presented to it by
10 looking at the material itself.

11 MR. HERDMAN: If I can just back up and just talk
12 about the -- the particular nuggets of evidence that I
13 think we're proffering Mr. Kohlmann for at this point. In
14 fact, if I can use the screens, do you know if these are up
15 and ready to go here?

16 THE COURT: Of course. That's why Cindy's here.

17 MR. HERDMAN: The first -- and all these relate
18 to particular exhibits that have either -- that are either
19 in evidence or the defense counsel's objected for some
20 reason. They're pending admission at this point before The
21 Court.

22 The first -- and this is the one that we've had
23 issues with in terms of the visibility with it, but I've
24 provided who's asked for it with a better copy of this.
25 The first is Government Exhibit Number 61. And this

1 particular piece of evidence here was given by Marwan
2 El-Hindi -- two pages were given by Marwan El-Hindi to
3 Darren Griffin, I believe, on February 6th of 2005. This
4 webpage is called the Masada webpage. And Mr. Kohlmann is
5 familiar with this webpage. He's familiar, in particular,
6 if you look in the lower, left-hand corner.

7 THE COURT:: How do you spell that?

8 MR. HERDMAN: M-A-S-A-D-A-H, {sic} I believe.

9 Now, if I can direct your, of course, attention
10 to this lower corner of this exhibit here, you'll see
11 there's an actual IP address there, Internet protocol
12 address. And Mr. Kohlmann is also familiar with this
13 particular Internet protocol address as a hosting site for
14 the Masada webpage.

15 So this is the first page here, and then if we go
16 to the second page, and the second page, Your Honor, that
17 was provided to Mr. Griffin, based on the Internet protocol
18 address in the lower, left-hand corner, appears to be from
19 the same website, Masada webpage. And you'll see here,
20 there's a Martyrdom Operation vest preparation, and below
21 that you'll see some other what are essentially hyperlinks,
22 that hyperlink particular zip files.

23 Now, the reason that -- the reason that this is
24 important is because this particular webpage -- you can't
25 see it on your screen, I apologize.

1 THE COURT: No, I can.

2 MR. HERDMAN: The reason that this particular
3 exhibit and webpage are important is that the Masada
4 webpage, in fact, is one that both Mr. El-Hindi and
5 Mr. Amawi discuss with Darren Griffin. In fact, in a
6 consensual recording, Mr. Amawi provides the website
7 address of the Masada webpage to Darren Griffin. And he
8 does that, I believe, on the 13th of April.

9 THE COURT: I'm sorry, who did that?

10 MR. HERDMAN: Mr. Amawi provides the Masada
11 webpage address to Mr. Griffin, and Mr. El-Hindi provides
12 these particular pages to Mr. Griffin.

13 MR. BOSS: What date was that, please,
14 April 13th?

15 MR. HERDMAN: I think it was April 13th of 2005
16 that Mr. Amawi gave the address to Mr. Griffin.

17 Now, the value of Mr. Kohlmann for this
18 particular exhibit, Your Honor, is very -- it's very
19 narrow. What he can say is, this is, in fact, the Masada
20 webpage, and the Masada webpage used this particular
21 Internet protocol address, that www.Masada, didn't always
22 necessarily take you to www.Masada. It may have taken you
23 to a different Internet protocol address.

24 And it's very important particularly for counsel
25 to deal with the Operation Martyrdom vest, the bomb vest

1 video, because if you'll remember in the recording, there's
2 much discussion with about where it's available, and it's
3 available for a limited period of time. There's much
4 discussion about where this video is actually available.

5 It turns out that what the Masada webpage did was
6 it linked to assorted copies of this bomb vest video, and
7 it is spread out all over the Internet, and there's what
8 all these links are on the second page, here. And in fact,
9 Mr. Griffin was actually able to access at least two of
10 these copies. And in fact, Your Honor, we -- there is
11 forensic evidence that one of the defendants accessed one
12 of these copies as well.

13 So this particular page, in effect, brings
14 together -- at least as to the bomb vest video -- brings
15 together the conspiracy, because this is a site and a
16 resource that is accessed by at least two defendants in
17 terms of finding this information and providing it to
18 Mr. Griffin. And I don't know that it's something that for
19 a forensic -- that a forensic computer expert can testify
20 to only because that computer expert is going to be limited
21 to the evidence as it currently exists in the electronic
22 evidence with which that expert's being presented.

23 THE COURT: Okay. Let me -- let's address that
24 first, okay.

25 MR. WHITMER-RICH: I would -- I guess I would say

1 that this -- the evidence establishes a lot of this from
2 what's -- from what I've heard, the evidence to the jury so
3 far. I believe that the evidence has shown that this video
4 was viewed in an -- by Mr. Amawi and Mr. Griffin together.
5 I believe that unless there's evidence to come, that there
6 will not be evidence that Mr. Amawi ever provided a disc
7 that actually had a copy of this that was -- government was
8 able to open and that they had him with doing so because I
9 don't think they were able to open it.

10 The charge on count, I believe, three, is the
11 viewing of it and that's already in evidence. The charge
12 of Count 4 for Mr. Amawi relates to another piece of
13 material, not the vest video, if I understand it. So I
14 don't think that the government's proof, the proof that
15 Mr. Amawi got it from this particular website, I'm not sure
16 what that has to do with anything. And --

17 THE COURT: What's the pertinence of displaying
18 this to the jury and forming of that?

19 MR. HERDMAN: The purpose of this, Your Honor,
20 are those hard copies of those webpages was given to
21 Mr. Griffin by one conspirator and an alternate way to
22 access this website was given to Mr. Griffin by another
23 conspirator. And in that --

24 THE COURT: I gather that that is relevant on the
25 distribution charges even though the mode of distribution

1 may differ, because if you look at the video and you say
2 here's where you --

3 MR. HERDMAN: That's correct and those defendants
4 are charged separately in those distribution counts, but
5 this is -- I'll address this later, but I actually think
6 that -- first of all, defense counsel have already argued
7 to The Court and have objected to certain of these exhibits
8 coming in. But they've argued to The Court that there are
9 two separate bomb vest videos that came into evidence.
10 They argue to The Court that Mr. Griffin never actually got
11 some of these documents from Mr. El-Hindi and, in fact, I
12 know with this particular exhibit, I would anticipate that
13 they will attack the chain of custody of this particular
14 exhibit. And --

15 THE COURT: You say that they will?

16 MR. HERDMAN: I anticipate that they will.

17 THE COURT: Of 61 or --

18 MR. HERDMAN: Yes, Your Honor. This was the
19 document that was scanned into a 302. So to that extent,
20 Mr. Griffin's credibility has already been called into
21 question numerous times, not only on cross-examination, but
22 on his direct examination in terms of some of the
23 accusations that have been leveled as to particular items
24 of evidence. And the government should be entitled to
25 corroborate Mr. Griffin's testimony with respect to this

1 entire chain of events that led up to the acquisition of
2 these bomb vest videos.

3 MR. HARTMAN: Your Honor, if I may, a couple of
4 things. Number one, this -- everything that has just been
5 argued was addressed in your decision, precisely the same
6 reasons that you decided these things weren't relative or
7 their probative value was outweighed was in your decision.
8 I will say, Mr. Herdman is correct that we'll challenge the
9 chain of custody on this because we've challenged its
10 submission because there's no origin on this.

11 Number two, I don't think they should be able to
12 do anything with this until a forensic computer specialist
13 can say that this came from Mr. El-Hindi's computer because
14 ours is going to say he didn't visit that website on the
15 5th. There are a lot of technical issues about this before
16 we ever get to whether or not Kohlmann's testimony is
17 relevant.

18 THE COURT: Well, I -- I disagree to this extent,
19 I think if I heard Mr. Herdman correctly, and I don't think
20 I covered this, at least not this precise point because I
21 didn't realize -- maybe I've been told, but I didn't
22 realize those were links to the bomb vest video, at least
23 that's not what I was thinking about when I wrote that
24 opinion. I wasn't conscious of that at the time. That I
25 do think that this is relevant to the separate charges as

1 to each of -- certainly as to Mr. El-Hindi, perhaps to
2 each. And that is that it's probably admissible -- because
3 it's a statement made by a co-conspirator and, of course,
4 in furtherance of the conspiracy.

5 This is a statement. It's in Arabic, and none of
6 us can understand it. The defendants can, but none of us
7 who don't speak Arabic can understand it, but nevertheless,
8 it is a statement. And the act of the utterance where it's
9 offered for the truth of the matter, asserted or not, has
10 independent evidentiary significance in light of
11 Mr. Griffin's testimony that it was given to him by
12 Mr. El-Hindi.

13 And I think that testimony as to the Internet
14 protocol address and the links, I believe Mr. Kohlmann is
15 competent to testify in a sense that he knows what he's
16 talking about, perhaps voir dire a little bit specifically
17 outside the hearing of the jury as to precisely those links
18 and get confirmation as to he does have a basis for that
19 testimony either firsthand or other reliable, but I think
20 it's admissible with regard to the charge, at least with
21 Mr. El-Hindi. It's not a conspiracy charge on the
22 distribution; those are separate.

23 MR. HERDMAN: They are separate counts, Your
24 Honor.

25 THE COURT: I think -- I think it would be

1 admissible only to Mr. El-Hindi.

2 MR. HERDMAN: Your Honor, they are separately
3 alleged overt acts within the conspiracy.

4 THE COURT: I'll try to untangle those threads
5 for the jury, but with regard to -- and I think we're
6 talking principally about the distribution of
7 how-to-make-a-bomb information. I really think it is
8 admissible as to Mr. El-Hindi. And why would it be as to
9 Mr. Amawi?

10 MR. HERDMAN: Mr. Amawi, if I'm correct there's
11 some discussion with both the website while this is being
12 launched, Your Honor.

13 MR. HERDMAN: On the 13th of April, 2005
14 Mr. Amawi and Mr. Masloun come over to Darren Griffin's
15 apartment. That's when Darren Griffin has the chart, the
16 drawings on the easel there, and if you remember,
17 Mr. Amawi's actually going to websites.

18 THE COURT: Right.

19 MR. HERDMAN: And he mentions during that, while
20 he's searching for certain items, he says you should go to
21 Masada webpage. And if my recollection is correct, he
22 actually goes to that website. You can see it on the
23 camera that Mr. Griffin was wearing. But he says the
24 actual -- he spells the actual URL for Mr. Griffin. And it
25 just so happens that the webpage that Mr. Amawi is now

1 directing Darren Griffin to go to is the same webpage that
2 Mr. El-Hindi had directed Darren Griffin to go to. And
3 then this also --

4 THE COURT: Okay. I -- I agree. I think in
5 light of what you're telling me, it does seem to me to be
6 admissible. Because absent that, it doesn't -- absent
7 elaborations through testimony and Mr. Kohlmann, it has no
8 evidentiary significance.

9 MR. HERDMAN: There's one additional point I want
10 to make that implicates a second piece of evidence, which
11 is the Muntada Al-Ansar forum. I know Your Honor is
12 familiar with this because Mr. Kohlmann addressed it in his
13 direct testimony, and it's also highlighted in his report.
14 The Muntada Al-Ansar forum was actually the original
15 distribution point --

16 THE COURT: I've got a conference call that I've
17 got to take. It's going to be probably 20 minutes or so.
18 I apologize. My office just reminded me.

19 MR. HERDMAN: I don't know, sitting here, how
20 long these particular clips are. I've identified clips
21 that are relevant. It could be 15 minutes or it could be
22 two minutes. I'm not --

23 THE COURT: I'm going to ask her to stay as a
24 back up.

25 MR. HERDMAN: Your Honor, just to illustrate,

1 this relates to --

2 THE COURT: By the way, I apologize to everybody.
3 I had totally forgotten that.

4 MR. HERDMAN: If you'll see on your screen, I
5 pulled up the particular clip where Mr. Amawi gives the
6 website to Mr. Griffin. If you're interested in listening.

7 (Audio playing.)

8 THE COURT: Do you have any sound?

9 MR. WHITMER-RICH: Is this 46 or 47?

10 MR. HERDMAN: This is one D48 of 49185. Clip 4A.
11 And it's Exhibit 4-42. And I don't know why I'm not
12 getting any sound.

13 (Audio playing.)

14 MR. HERDMAN: And Your Honor, that portion
15 actually is important when you look at the actual URL, the
16 Mott -- it's actually in -- it doesn't say Masada the way I
17 spelled it for The Court. It's M-A-S-A-D-A, I believe. So
18 he actually spells it exactly for Mr. Griffin.

19 (Audio playing.)

20 MR. HERDMAN: And Your Honor, just say the
21 conversation in the proceeding clips, Mr. Griffin's asking
22 specifically about the bomb vest video, and again, saying
23 you never -- he never gave me a copy of it, and this kind
24 of leads up to this.

25 THE COURT: No. Always, I said, I understand

1 what it is. This is pertinent, too, and I disagree with
2 the defendants as to the propriety of the evidence that was
3 explained to the jury, the significance of that, and its
4 probative value of that exhibit. And I do think you need
5 somehow to have it connected, and I think obviously
6 Mr. Griffin cannot.

7 MR. HERDMAN: And Your Honor, I brought up again
8 here -- this is the second page of Exhibit 61. It's very
9 hard to read, it looks like, on your screen. I'll try to
10 zoom it in.

11 THE COURT: Sure. It's legible.

12 MR. HERDMAN: So what you see there when you look
13 at these hyperlinks, here, is you see a link to the
14 Martyrdom Operation vest preparation. That particular
15 version of this video was first released on the Muntada
16 Al-Ansar forum. The Muntada Al-Ansar forum is a website
17 that Mr. Amawi, in particular, discusses quite a bit
18 throughout the consensual recordings.

19 THE COURT: I remember that.

20 MR. HERDMAN: He uses different names for it but
21 all of them focus around Al-Ansar. And he talks about
22 Al-Ansar Al-Qaeda. He talks about Muntada Al-Ansar being
23 an Al-Qaeda website. And it's actually a website that he
24 discusses specifically with Mr. El-Hindi when they meet.

25 I think I have an exact date when they actually

1 discuss it. I believe it's in 1D22. Exhibit 4-28, clip
2 2-A. And -- and the entire conversation there is about
3 this particular website, and Mr. El-Hindi, with
4 reference -- they're talking about the bomb vest video in
5 this clip.

6 MR. HARTMAN: What's the date on that?

7 MR. HERDMAN: The date on that is -- I think it's
8 January 31st or March -- no, it's January. This is the one
9 thing I didn't recognize the dates. It's --

10 MR. WHITMER-RICH: I believe it's February 2nd,
11 2005.

12 MR. HERDMAN: Thank you, Mr. Whitmer-Rich.

13 And in that conversation, I believe this is one
14 where Mr. El-Hindi says, do they have the ones for
15 manufacturing as well. And that whole conversation centers
16 around the actual production of this bomb vest video and
17 the availability of it.

18 Now, Mr. Amawi references the Muntada Al-Ansar
19 forum in a number of different contexts, but what you can
20 see when you link up Exhibit 61 to Mr. Amawi's
21 conversations about Muntada Al-Ansar is that the -- the
22 bomb vest videos that were available on Exhibit 61 were
23 created because the Muntada Al-Ansar forum stopped offering
24 these videos at a certain point in time, and you actually
25 couldn't link to that continuing version of it anymore. So

1 what the Muntada did was provide all the different places
2 where this video was available on the web. You'll see one
3 of them has a wansan.jp address. This particular URL is
4 discussed on a consensual recording between Mr. El-Hindi
5 and Mr. Griffin. And I think this sniper.zive.net is also
6 mentioned during that same conversation. So what you can
7 see is, again, it's a progression from a particular website
8 that Mr. Kohlmann can explain.

9 And when the defendants talk about Muntada
10 Al-Ansar or Al-Ansar, it's not clear exactly what it is
11 that they're talking about. Mr. Kohlmann will come in,
12 again, for the very limited purpose of saying this was a
13 particular website. This website was password protected.
14 You had to register. In fact, the defendants talk about
15 that, having to register for a particular website. So
16 Mr. Kohlmann can confirm that what the defendants are
17 talking about is, in fact, true, and that the information
18 that they're giving to Mr. Griffin is, in fact, true. And
19 they've given it to him in a number of different ways.

20 But just standing alone, it's not apparent from
21 some of these -- they're only audio recordings, some of the
22 discussions are in video recording, but it's not like the
23 video shows them typing in the URL, going to that
24 particular website. It's not necessarily a step-by-step.

25 And Mr. Kohlmann will come in -- and this will be

1 very short, this particular testimony, but he will just
2 explain that there was a website called Muntada Al-Ansar.
3 That website was required a registration after a certain
4 point in time. It was password protected and this website
5 served as a distribution point for certain videos. One of
6 which was Operation Martyrdom vest preparation.

7 And the discussion about Muntada Al-Ansar leads
8 all the way up to January 10th when Mr. Amawi is discussing
9 with Mr. Griffin the actual bomb vest video and plays it
10 for him.

11 This discussion Muntada Al-Ansar, though, by
12 Mr. Amawi, starts back in November, and he discusses it all
13 the way back to January and talks about new videos that are
14 available.

15 And if I can have just a moment, I can point you
16 to one clip in particular. This is from 1D18, 69185, clip
17 4A. And this is Exhibit 4-23.

18 MR. IVEY: Mr. Herdman, what's the date on this?

19 MR. HERDMAN: This one is -- I'm sorry, we'll get
20 it, I just have to -- I don't have it easily searchable. I
21 believe it's January 21st.

22 MR. IVEY: You said January, what?

23 MR. HERDMAN: Twenty-first, 2005.

24 MR. WHITMER-RICH: I think it's the 27th, maybe.

25 MR. HERDMAN: Yeah, you're right. It's the 22nd.

1 MR. WHITMER-RICH: Twenty-seventh.

2 MR. HERDMAN: Twenty-seventh, okay, the 27th.

3 MR. WHITMER-RICH: That's what I think.

4 MR. HERDMAN: Yeah, that's correct.

5 So 1D18, Exhibit 4-23, clip 4A.

6 (Audio playing.)

7 MR. HERDMAN: Your Honor, what is going on there
8 is they're actually -- Muntada Al-Ansar, when you type in
9 the URL is Ansar.net/vb. And the reason.

10 THE COURT: BB as in baseball, baseball.

11 MR. HERDMAN: Victor Bravo. And the reason that
12 that's important is because that particular website does
13 appear in Mr. Amawi's web favorites, and Mr. Kohlmann,
14 again, will explain that that actual URL corresponds to the
15 Muntada Al-Ansar forum. Otherwise, it's just standing
16 alone, and there's no actual evidence of any linkage
17 between all of these different elements.

18 The fact that Muntada Al-Ansar was located that
19 the particular URL, and there was -- and he may have great
20 interest in this case that was available on Muntada
21 Al-Ansar before it was available anywhere else, and -- oh,
22 and that's the kind of thing that Mr. Kohlmann will be --
23 again, a very limited, narrow sense regarding this Muntada
24 Al-Ansar forum.

25 MR. WHITMER-RICH: I don't think there's a

1 dispute in this case that Mr. Amawi downloaded a copy of
2 the vest video and had it on his computer. And that he's
3 visiting Ansar or there's talk of Al-Ansar and so forth.

4 THE COURT: Is that in the definition?

5 MR. WHITMER-RICH: It -- there's a proposed --
6 the government's most recent proposed stipulation strips
7 out all of the websites.

8 MR. HERDMAN: We're having trouble agreeing on
9 language.

10 MR. WHITMER-RICH: I think we'd probably be able
11 to reach agreement on those. But I think that we can
12 identify for the jury that it's a popular align Jihadist
13 forum, for example. That was one definition that was
14 coming to my mind that was proposed at one point.

15 THE COURT: Does it have a particular sponsor,
16 closed quote?

17 MR. HERDMAN: I believe this is the website, Your
18 Honor, that is discussed in the report regarding Irabby
19 007; again, we wouldn't be getting into that kind of
20 detail, though.

21 But this was Muntada Al-Ansar was used by
22 Al-Qaeda in Iraq was their first distribution point on the
23 web for any video production that they wanted to put out
24 there. Again, I don't know that we necessarily need to get
25 into that level of detail. I just think it's important to

1 have Mr. Kohlmann come in and explain to the jury the fact
2 that all of this does, in fact, tie together and not just
3 in a way that's in a stipulation.

4 MR. HARTMAN: He didn't -- he didn't say that
5 this is where the video came from, right?

6 MR. HERDMAN: He doesn't in this clip.

7 MR. HARTMAN: When he was on the stand, he
8 couldn't say where.

9 THE COURT: He, being Kohlmann?

10 MR. HARTMAN: Yeah, Kohlmann couldn't say where
11 they --

12 THE COURT: -- where this copy came from?

13 MR. HARTMAN: Correct.

14 THE COURT: Well --

15 MR. WHITMER-RICH: I'm not sure how -- why that
16 matters so much. We had a copy of it and he -- and the
17 government alleges purported gave a copy to Mr. Griffin and
18 failed to do so. They viewed a copy together and then
19 there's some evidence related to Mr. El-Hindi in all of
20 this. I -- I think that evidence speaks for itself. We're
21 not pretending that this copy didn't exist on Mr. Amawi's
22 computer. I'm not sure that it adds what source it came
23 from.

24 MR. HERDMAN: Your Honor.

25 THE COURT: There are basically two sources being

1 suggested, one direct and the Ansar. I think for the jury
2 to understand the nature of the website and what was
3 available on it, I'm not sure the sponsor, closed quote,
4 is -- is necessary, but just the kinds of thing one would
5 find, and perhaps even then, for instance, materials
6 produced by Al-Qaeda in Iraq.

7 I don't want to make a big deal out of that, just
8 saying, look, I can tell the jury these defendants are no
9 connection, this simply is being shown so you understand
10 the kinds of site -- the kind of site that this was. And
11 the other one was Masada website, which an -- as I
12 understand it -- is sort of an entry portal, once the video
13 is no longer available on Al-Ansar or to be taken down from
14 there.

15 Simply saying, these are sources accessed by
16 Mr. Amawi and from either of which the video could have
17 come, period, end of discussion, which I think is what
18 you're --

19 MR. HERDMAN: Correct, Your Honor.

20 THE COURT: -- connecting those dots.

21 MR. HERDMAN: The fact that Mr. Kohlmann has much
22 more information about Muntada Al-Ansar, I don't think we
23 really need to get into about that. And the only thing I
24 would say with respect to Muntada Al-Ansar in his response
25 or is Mr. Amawi himself says that is Al-Ansar Al-Qaeda.

1 THE COURT: I remember that.

2 MR. HERDMAN: There's some evidence suggesting
3 that this website that he's talking about, specifically on
4 this date, is the website that he discusses back in
5 November or December of 2004 and acknowledges knowing that
6 it's sponsored by Al-Qaeda. Now, that's the only
7 connection of Al-Qaeda that we would ever allege in this
8 case.

9 MR. HARTMAN: Then why does an expert need to
10 satisfy that if the defendant's understanding is what is
11 important, then, the defendant's intent?

12 THE COURT: I'm saying I'm not totally opposed to
13 it. I don't really care one way or the other. I think it
14 is important to say, if you go to this website, these are
15 the kinds of things you're going to see.

16 MR. WHITMER-RICH: Your Honor, I believe that we
17 will be able to reach a stipulation that will accomplish
18 that purpose.

19 THE COURT: So far you haven't and that's the
20 point I made earlier. And in any event, I'm going to
21 permit Mr. Kohlmann to testify with regard to Exhibit 61.
22 And that will permit him to testify both as to giving the
23 61, Mr. El-Hindi, which has the source of the bomb vest
24 video, and there was another reason.

25 MR. HERDMAN: The IP address on Exhibit 61, Your

1 Honor.

2 THE COURT: Right.

3 MR. HERDMAN: The fact that Mr. Amawi spelled out
4 the Masada webpage for Mr. Griffin.

5 THE COURT: Was that also in his list of
6 favorites?

7 MR. HERDMAN: I don't believe that it was, but
8 I -- I'm not positive about that. I know that it was
9 somewhere, but I can't remember where it was.

10 MR. HARTMAN: Your Honor, I would just ask that
11 The Court require the government to lay a factual
12 foundation for Exhibit 61 prior to allowing any testimony
13 about it and when --

14 THE COURT: Go ahead.

15 MR. HARTMAN: I'm sorry.

16 THE COURT: No, go ahead.

17 MR. HARTMAN: Particularly in -- because, I mean,
18 that's what the forensic computer examiners do, which
19 Mr. Kohlmann said he can't do. And particularly in light
20 of the fact that they have no original, there is --

21 THE COURT: And can -- what will the testimony be
22 in terms of admitting --

23 MR. HERDMAN: I'm sorry, Your Honor.

24 THE COURT: What will the foundation be for
25 admitting the duplicate --

1 MR. HERDMAN: We've told --

2 THE COURT: -- of 61?

3 MR. HERDMAN: We've told counsel that whatever
4 was given to Darren Griffin, that is all that is left is
5 what was scanned into that 302.

6 THE COURT: And where did that come from?

7 MR. HERDMAN: It was -- the testimony from Darren
8 Griffin was that El-Hindi handed that to Mr. Griffin, and
9 then Mr. Griffin gave that to FBI agents.

10 THE COURT: And Mr. Griffin can testify that is a
11 duplicate so far as he's aware.

12 MR. HERDMAN: Yes, he says -- he did testify, in
13 fact, that those were what he was given.

14 THE COURT: Yeah, I remember. I honestly think
15 that's sufficient.

16 MR. BOSS: Your Honor, if I may add, I think that
17 among the things that we need to address is the computer
18 forensic foundation before the Kohlmann testimony comes in.
19 And the reason for that is we do believe -- and
20 Mr. Herdman, please correct me if I'm wrong -- that there
21 is no evidence of that document imprinted on any -- or ever
22 having resided on any of the El-Hindi computers.

23 MR. HERDMAN: Your Honor, counsel has a copy of
24 Mr. Corrigan's forensic report, and.

25 THE COURT: A copy of --

1 MR. HERDMAN: Counsel has a copy of
2 Mr. Corrigan's forensic report.

3 THE COURT: Corrigan --

4 MR. HERDMAN: Joseph Corrigan, our forensic
5 computer expert, and I would say that Mr. Boss is wrong.

6 THE COURT: He is?

7 MR. HERDMAN: He is wrong.

8 THE COURT: Well, that evidence is what it is.
9 It doesn't matter where it came from. It could have been
10 given by some third party. So the fact that Mr. El-Hindi
11 didn't -- his computer doesn't show that he accessed it and
12 obtained it himself doesn't matter, I don't think. What
13 matters is, he gave that document containing that
14 information to Mr. Griffin. And that information is
15 related to the bomb vest video charge and distribution.

16 And also, I'm not -- taking a quick look at the
17 rule of evidence, but a thousand and one, or whatever it
18 is, about copies and duplicates, my understanding that the
19 standard is really quite relaxed. Duplicates is the Rule
20 10-3: Duplicate is admissible to the same extent as an
21 original unless the genuine question is raised as to the
22 authenticity of the original or in the circumstances -- or
23 not circumstances, it would be unfair to admit the
24 duplicate in lieu of the original.

25 Always been my understanding it takes no more to

1 admit a duplicate than somebody says that's it, it hasn't
2 been changed. I don't know where the original is, I have
3 no idea. And the lack of the original goes to weight
4 rather than admissibility. And it's -- and in the 18th
5 century it made more difficult to get a duplicate, but
6 that's before the age of Xerox.

7 MR. HERDMAN: And again, Your Honor, the Exhibit
8 61 --

9 THE COURT: And again, I think that in terms of
10 the extent to which there is proof -- as I gather that
11 there is -- I think looking at the vestige report, there's
12 no evidence Mr. El-Hindi accessed it, then it's a matter of
13 credibility in cross-examining Griffin or trying to impeach
14 his veracity and his claim that he got it from
15 Mr. El-Hindi, and that's a matter for the jury to sort out.

16 MR. HERDMAN: And just in terms of order, Your
17 Honor, if you're concerned about this at all, I do
18 anticipate that Mr. Corrigan, a forensic computer expert,
19 will testify this is the way we've had to go about this
20 anyway, but Mr. Corrigan testified in advance of
21 Mr. Kohlmann, so it would be -- I think there's significant
22 foundation.

23 THE COURT: And what will Corrigan say?

24 MR. HERDMAN: He will say a number of things,
25 Your Honor.

1 THE COURT: About this?

2 MR. HERDMAN: With respect to this particular --
3 I'm sorry, we're talking about Exhibit 61?

4 THE COURT: Right.

5 MR. HERDMAN: His -- his report reflects the fact
6 that there is evidence that, one, Mr. El-Hindi's computers
7 did access this specific IP address.

8 MR. BOSS: On what date?

9 MR. HERDMAN: It's in the report. All of this is
10 in the report.

11 THE COURT: It's in the report.

12 MR. BOSS: Pardon me, I think that the reason
13 it's important is that that alleged access is after the
14 date that that document was printed. And that's the
15 problem, if I'm not mistaken.

16 MR. HERDMAN: Again, Mr. Boss is mistaken, but
17 I'm not going to sit here and testify -- there is an
18 explanation for all of this, Your Honor.

19 THE COURT: And as I say, if there is, there is;
20 and if there isn't, there isn't. Doesn't matter what we
21 have a witness who says I recognize it. I've got it. I
22 don't know if he says when he got it. I can't recall.
23 This is what I got. This is from whom I got it and this is
24 what I did with it. And if we need a further chain of
25 custody, we'll have someone from the bureau testify or

1 probably outside the hearing of the jury and say we don't
2 know where it is, I suppose.

3 Does an agent recall getting this item?

4 MR. HERDMAN: Yes, especially in light of the
5 fact that it's scanned into the 302 of the documents
6 received.

7 THE COURT: Okay. I think that even adds to the
8 foundation and the fact that the -- that it got scanned is
9 a commonplace enough exercise doesn't raise any doubt in my
10 mind that this is a genuine duplicate.

11 MR. HERDMAN: Your Honor, the Exhibit 61, I
12 brought up the Muntada Al-Ansar forum because they are
13 linked in some way because these are both distribution
14 points for this bomb vest video. And again, this sort of
15 search among the conspirators and with Mr. Griffin for
16 these bomb vest videos goes on for at least a month,
17 perhaps a month-and-a-half or two months. But there's --
18 on almost a daily basis Mr. Griffin's expressing his
19 frustration of not being able to obtain --

20 THE COURT: I recall that.

21 MR. HERDMAN: -- a copy of the video. And
22 Muntada Al-Ansar serves as the starting point, if you will,
23 the Masada webpage takes what Muntada Al-Ansar forum --

24 THE COURT: Again, I've already indicated I think
25 it's permissible for Mr. Kohlmann to say this is what could

1 be located at the various times on these particular
2 websites and have either of the defendants, and perhaps
3 according to your evidence, both either accessing or
4 providing information about either or both of those
5 websites.

6 And I think that at least the bomb vest video
7 charge, and as Mr. Sofer said with regard to the overt
8 acts, I think -- I think that this is admissible. And I
9 don't know an other source of having it for -- and I
10 realize that you have a foot in the door and a -- agree to
11 stipulations, but that's the way it goes. If you can
12 stipulate, terrific.

13 MR. WHITMER-RICH: I believe we can, Your Honor.

14 THE COURT: Okay. If you can, he can.

15 What else as to Mr. Kohlmann?

16 MR. HERDMAN: If I take Your Honor and counsel to
17 Exhibit 62, this is another webpage that was Mr. Griffin's
18 testimony moves this -- this three-page document related to
19 the Ansar Jihad webpage was given to Mr. Griffin by
20 Mr. El-Hindi on or about the 16th of February, which is the
21 date that's printed in the lower, right-hand corner of this
22 exhibit.

23 Now, the reason that this particular exhibit
24 requires some --

25 THE COURT: Who printed that?

1 MR. HERDMAN: Who printed it?

2 THE COURT: 216.

3 MR. HERDMAN: I believe there's circumstantial
4 evidence that Mr. El-Hindi printed it.

5 THE COURT: The date on there just -- just --
6 it's on the original document so whoever originally printed
7 that document off.

8 Okay.

9 MR. HERDMAN: Now, the reason that this
10 particular document is important -- if I bring up the
11 translation -- and the reason it requires some explanation
12 by Mr. Kohlmann is, again, Mr. Kohlmann is familiar with
13 Ansar Jihad, and I will tell you frankly that Mr. Kohlmann
14 will say this is not one of these elite forums, much like
15 Muntada Al-Ansar or Ekhlaas, which I'll discuss in just a
16 moment.

17 Ansar Jihad was basically the equivalent of a guy
18 running a mechanics shop out of his garage. It was kind of
19 an amateur issue effort to collect a bunch of videos
20 together -- but the reason that this particular document is
21 important -- and we just zeroed in here on a series of
22 videos that relate to operations by Chechnyan Mujahideen
23 against the Russians either in Chechnya or somewhere in the
24 Caucasuses.

25 Now, if you'll remember, on the 16th of February,

1 that's the date when all three defendants and Mr. Griffin
2 went over to Mr. El-Hindi's home and they actually viewed a
3 video at some point in time. And that video, when you
4 listen to it, you can tell -- and actually they're talking
5 about this, that the fact that it relates to Chechnyans
6 attacking the Russian convoy.

7 Mr. Kohlmann is familiar with all of these
8 Russian Hell videos, and I anticipate that his testimony
9 will be -- and again, I have not played this exact clip for
10 him so I can't say this will be the case -- but I
11 anticipate that his testimony will be that the sounds of
12 them that are playing in the background are consistent with
13 one of these four versions of Russian Hell, and the fact
14 that that's important is because Mr. Griffin walks out of
15 that meeting with this particular document linking him to
16 these movies.

17 And the government's position is that the viewing
18 of those videos and the actual instruction that's being
19 given during the viewing of those videos are very important
20 to proving our charges in this case.

21 Mr. Kohlmann adds something that no other witness
22 can bring into this, which is familiarity with these four
23 videos, familiarity with the audio portion of those four
24 videos, and familiarity with the Ansar Jihad. He has all
25 three things that he can bring together. And again, this

1 would be a simple matter of showing him this document,
2 playing the pertinent portion of the clip for him, and then
3 asking him if he has an opinion as to where these
4 particular exhibits might link up.

5 MR. HARTMAN: Where's the instruction? What's
6 the instruction part of this?

7 THE COURT: Rather than that -- I mean, I gather
8 what you're saying is he would be able to describe for the
9 jury what was being viewed while the conversation was
10 occurring?

11 MR. HERDMAN: That's correct. And I should say
12 that these particular videos, Russian Hell, were not
13 recovered off any computer.

14 THE COURT: You anticipated my next question. So
15 it's a little like a duplicate in a sense?

16 MR. HERDMAN: In a sense and only the audio
17 portion.

18 MR. WHITMER-RICH: And as an alternative,
19 Mr. Griffin could have described what the video was while
20 they were watching it.

21 MR. HERDMAN: My only -- my position on this
22 would be if you're not a person who watches these videos,
23 literally hundreds of times like Mr. Kohlmann has.

24 THE COURT: I do think that unless there was some
25 conversation when this document was given to Mr. Griffin,

1 linking it directly to a particular video and -- which
2 would explain the connection between the two. I can't
3 recall whether there was or not.

4 MR. HERDMAN: There wasn't, with respect to this
5 document, but again, this is circumstantial evidence.

6 THE COURT: I understand. Again, my point --
7 they're not being -- if it were the government's evidence
8 that someone said if you want to get another look at this
9 video of this attack occurring, here's where you go. If
10 there was something of that sort recorded in evidence, then
11 I would say, hey, you already know we'll introduce this,
12 we're not going to talk about what the video was, but I
13 agree with you that I think to link up this exhibit with
14 what was being viewed, absent the video itself, I think
15 it's appropriate to have somebody acknowledge, say, there
16 is no duty of certainty, I believe, that this is one of the
17 videos that's being watched.

18 And also, again, I don't recall you indicated if
19 those conversations that the government will contend was
20 instructional or, quote, training, and I will rely on that
21 subject to -- to it being disputed by the defendants. But
22 that also seems to me to make the significance of the
23 conversation as relevant because it helps prove that and
24 that's a fact in issue.

25 MR. HERDMAN: Next is -- I think we're almost --

1 almost to the end, Your Honor.

2 THE COURT: Of this segment or everything?

3 MR. HERDMAN: Of everything. We have a couple
4 more to go here. And 73, page 3.

5 THE COURT: And what is -- back up for a moment.
6 On 62, what -- I mean, what else is on there? What's the
7 significance of that? In other words, is that a catalog
8 that came from the website or is it simply something that
9 was typed up?

10 MR. HERDMAN: It actually appears to be a
11 printout. That's the other thing, Your Honor, is that
12 Mr. Kohlmann can say that this appears to be a printed
13 version of what was on the website around or about that
14 particular time. Otherwise, you're right.

15 THE COURT: That was my question.

16 MR. HERDMAN: It looks like it might be an Excel
17 spread sheet that somebody made up. Here's the translation
18 of it. You can see here's the name of the movie, and it
19 says, click here -- which is essentially the hyperlink
20 version of it.

21 THE COURT: Now, what is this?

22 MR. HERDMAN: I'm sorry --

23 THE COURT: This isn't the same thing is it?

24 MR. HERDMAN: This is a translation of the first
25 page of the Ansar Jihad.

1 THE COURT: Okay. And what was the other thing,
2 the thing we just looked at with the Russian Hell.

3 MR. HERDMAN: That was the third page.

4 THE COURT: Okay, it was all part of the same
5 exhibit.

6 MR. HERDMAN: Correct.

7 THE COURT: Okay, I didn't understand that.

8 MR. HERDMAN: We're going to discuss Exhibit 73
9 now. This is Exhibit 73. This is the Just Jeans e-mail.
10 And this relates to -- this is the document actually
11 printing out in this particular 1D that relates to this,
12 it's 1D -- 1D8 of 69440, it's Exhibit 4-76. And it's one
13 or more clips where Mr. El-Hindi first talks about the
14 Islamic Army of Iraq at Yahoo groups
15 IAIIraq@Yahoogroups.com, goes through a particular e-mail
16 that was -- it's in evidence and I'll get to that in a
17 moment, but before he does that -- or after he does that,
18 I'm sorry, he talks about this particular Just Jeans
19 e-mail. He prints it off, and then there's Mr. El-Hindi
20 and Mr. Griffin are sitting side by side reading off of the
21 computer screen. Mr. El-Hindi's translating Arabic for
22 Mr. Griffin off of the computer screen.

23 And if you go to the third page of this exhibit,
24 you see there's a handwritten thread. This is the thread
25 that Mr. Kohlmann actually can recreate. And the

1 archived -- I've provided a version of it. It wasn't the
2 most legible version, unfortunately. For some reason, it's
3 shrunk down, I'll try to get a better copy of it. But when
4 you go to that thread, the archived version of that thread
5 and compare it to this thread and you compare it to the
6 conversation that's going on in the background, it's very
7 clear that what Mr. El-Hindi was reading to Darren Griffin
8 is the actual webpage that Mr. Kohlmann is able to
9 recreate. For instance, there's specific language in there
10 relating to the closing date of the website's registration,
11 and I think Mr. El-Hindi says, oh, this is the last day,
12 you have to register today; it's going to close tomorrow.
13 The website actually says that, although it's in Arabic.

14 THE COURT: And why is this --

15 MR. HERDMAN: The Ekhlaas website has the
16 registration process that was in place where you could
17 receive either basic training or there were more advanced
18 courses. I think one of them was something like battle
19 field medicine or some sort of Jihadist medicine that was
20 available, first aid that was available. And so --

21 THE COURT: Is there any proof that any of the
22 defendants accessed that and got that? I remember Ekhlaas
23 was --

24 MR. HERDMAN: This -- to some extent, Your Honor,
25 this is our proof that they accessed this website. When

1 you can compare the actual document that was the website
2 and compare that -- and again this is an archived version,
3 it's essentially like photocopying the website at the time
4 it existed -- you compare that document to what's going on
5 in the consensual recording and then link it up with this
6 particular thread that Mr. Griffin wrote or Mr. El-Hindi
7 wrote down -- I don't remember what the evidence was as to
8 who wrote it down -- Mr. Griffin wrote it down. Those
9 three things put together, the fact that Mr. El-Hindi very
10 clearly viewed this website with Mr. Griffin on this
11 particular date. And Ekhlaas website is one of these
12 websites that run through this case. Mr. Amawi talks about
13 the Ekhlaas website.

14 THE COURT: Right, I remember that.

15 MR. HERDMAN: So again, it's one of these
16 websites that we have circumstantial proof that it was
17 visited by these defendants and more importantly than that,
18 particular parts of that website Mr. Griffin was directed
19 to go to by these defendants.

20 THE COURT: And so what -- what else do you want
21 Mr. Kohlmann to tell us about either Ekhlaas or what the
22 evidence shows the defendants did or accessed?

23 MR. HERDMAN: We would need Mr. Kohlmann to
24 confirm that this thread that was written down by him
25 actually did exist as a webpage. We would have to present

1 the archived version of that webpage, and we would have.

2 THE COURT: Which would be what, this --

3 MR. HERDMAN: No, Your Honor. The archived
4 version -- I can pull up. Actually, it's on my computer.

5 THE COURT: Whatever. What is it, just tell me?

6 MR. HERDMAN: It's a .pdf, the version that I
7 have an is a .pdf, Adobe Acrobat version. It's about a 11
8 pages, maybe. I can hand it up to The Court. And I think
9 counsel has this.

10 THE COURT: In Arabic?

11 MR. HERDMAN: It is in Arabic.

12 MR. SOFER: I think this is -- Judge this is the
13 part you can't see.

14 MR. HERDMAN: The typing on this, unfortunately,
15 is very small. Again, it's very small, Your Honor.

16 I'll try to get a -- that was the best -- the
17 only way I could actually print it is the way you actually
18 have it there.

19 THE COURT: Okay. In other words, this is what
20 you get when you go to that?

21 MR. HERDMAN: Sorry, Your Honor.

22 THE COURT: This is what you get when you go to
23 the Ekhlaas --

24 MR. HERDMAN: Correct. Of course it doesn't
25 exist anymore.

1 THE COURT: Right. That's what was gotten. And
2 this was obtained by Mr. Kohlmann --

3 MR. HERDMAN: Correct.

4 THE COURT: -- this document? Has this been
5 marked as an exhibit?

6 MR. HERDMAN: No, it has not. It's not been
7 presented yet.

8 THE COURT: And this is what -- according to your
9 anticipated testimony was being translated by Mr. El-Hindi
10 for Mr. Griffin, and I don't remember what was it, what is
11 it?

12 MR. HERDMAN: It -- it starts off saying -- it
13 talks about a particular training course that's available
14 online through this webpage and the registration
15 procedures. There's a link there, and there's a basic
16 course, there's a more advanced course.

17 Mr. El-Hindi explains what kinds of courses are
18 available and informs Mr. Griffin that he has to hurry to
19 register for this particular site because it closes the
20 next day.

21 MR. SOFER: Judge, this interface is what we're
22 talking about this morning. Counsel is going to talk about
23 the 18 definitions of training while the government needs
24 to be able to respond to that.

25 THE COURT: I understand.

1 MR. SOFER: I don't know if you can see on there.
2 But if you can look at that particular website, if you look
3 at what's on that website, that page at least, it's fairly
4 clear what kind of training we're talking about. And this
5 is not training for soccer. This is not training -- in
6 other words, without -- without that document, without
7 being able to show --

8 THE COURT: I understand. I'm inclined to let it
9 in.

10 MR. HERDMAN: And Your Honor, I think the
11 testimony from Mr. Kohlmann would also be that to access
12 this thread, you would have to be a registered user who has
13 a password, because this Ekhlaas was another one of these
14 password-protected, registration-required websites.

15 THE COURT: Counsel, I'm inclined to let this in
16 in light of the representations that are being made.

17 MR. HARTMAN: Judge, I think the recordings from
18 that date says you don't need a password when you talk
19 about that website.

20 THE COURT: Again, it's fuzzy in my mind, but
21 both Mr. Kohlmann -- and also I think maybe there was a
22 period of time there was no password required, but then you
23 had to get a password at some point. They drew up the draw
24 bridge or at some point they -- a barrier that you can only
25 access by password.

1 MR. HARTMAN: Are you saying you're -- you're
2 inclined to admit that now?

3 THE COURT: No. No. I'm talking about
4 Mr. Kohlmann's testimony.

5 MR. HARTMAN: Oh. Well --

6 THE COURT: And I think that it's -- I think,
7 again, to understand what it is that's being discussed, we
8 have to have some testimony from somebody, and the
9 significance of it, I think, this is probative,
10 particularly in light of what Mr. Sofer just said. Even
11 absent that, I think it's probative.

12 MR. HARTMAN: I guess, Judge, I still think, I
13 mean, the defendants -- if what the government says is true
14 about the tapes, the defendants talking about getting
15 training and watching people getting shot, killed, and
16 blown up -- and I mean, that speaks for itself. And you
17 hear Mr. Griffin, like Mr. Griffin just said begging -- not
18 begging -- bugging for a month to get a copy of this thing.

19 I think the -- I think, frankly, the way you said
20 it in your order before about the fact that it would be so
21 prejudicial to have an expert come in and explain all these
22 things when they really speak for themselves as to the
23 intent of the defendants.

24 THE COURT: But as to these three or four things,
25 I think that these have a probative value and details that

1 can be relatively few in number. And I expect his
2 testimony to be very pinpointed precisely to what the
3 government's offering, which is explanatory, and in this
4 instance, this is what was being described. He was
5 getting -- if I understand correctly -- the Ekhlaas --
6 printed Ekhlaas on the back of the prior exhibit would get
7 you this; is that correct?

8 MR. HERDMAN: Correct, Your Honor.

9 THE COURT: Now, are these -- are these or do
10 they have links to particular, quote, training materials
11 and/or slash videos?

12 MR. HERDMAN: Well, that's what the online course
13 that Ekhlaas was offering -- there's a -- I believe it's a
14 hyperlink that from within that original document that was
15 on the Internet, you hit a button to register for the basic
16 or more advanced courses.

17 I have pulled up here, this is Exhibit 74, which
18 is the -- a confirmation e-mail that Mr. Griffin received
19 and you see there it says, Ekhlaas@hotmail.com.

20 Again, it's all -- this all fits together in that
21 this goes to prove that Ekhlaas actually was a
22 registration-required, password-protected website, because
23 Mr. Griffin himself registered for this thing, and that's
24 how we have the e-mail that he received as confirmation
25 that he was then registered with Ekhlaas.

1 MR. HARTMAN: And again, I don't see any evidence
2 that this is a confirmation e-mail. It's an e-mail.
3 It's -- it's -- it doesn't say anything. I mean, you can
4 see -- yes, you can see the website and the date and time
5 and everything else, but --

6 THE COURT: But I recall him testifying that
7 that's what he understood it was. And if you have the
8 printing here, again, I think that goes to weight not
9 admissibility. I think I recall his testimony about this,
10 and I think it established a foundation that it is what the
11 government contends it is.

12 MR. BOSS: Judge, I don't recognize the language,
13 the printing. I'm wondering, can I see some handwriting on
14 there, user pointing under Ekhlaas hyphen Jihad one? Did
15 it arrive like that?

16 MR. HERDMAN: Your Honor, if you remember,
17 defense counsel objected to this particular exhibit going
18 in based on the fact that this is language of an
19 undeterminate -- this isn't really a language that -- a
20 font that's on their subject line, font line, and large
21 portions of text. I believe the testimony was that
22 Mr. Griffin wrote that on there himself as an -- as an
23 explanation to the agent that handed to -- he handed it to
24 and as a reminder to himself as to what his password was.

25 THE COURT: That is my understanding or recall.

1 So I think there's mention to Griffin and that it is what
2 he contended he can testify it was or is.

3 But again, the -- the -- this is probative
4 because it informs the jury the significance of what it was
5 that was being viewed when they otherwise not be likely to
6 understand it. This is different than the videos of the
7 roadside bomb going off of people being shot. They
8 communicate themselves, the entire message that I think is
9 probative and admissible.

10 But with regard to this, and once again,
11 particularly in light of what Mr. Sofer commented, I think
12 that this is admissible. And I think it's quite apparent
13 the only way it will make any sense to the jury is to have
14 the evidence of what it is and where it comes from. And
15 Mr. Kohlmann is what's being proffered.

16 Anything else?

17 MR. HERDMAN: The next thing that's on the screen
18 here for Your Honor is the -- this is the IAI Iraq at -- it
19 says.

20 THE COURT: Does this have an Exhibit Number?

21 MR. HERDMAN: Seventy-three, Your Honor.

22 THE COURT: I see, okay.

23 MR. HERDMAN: And this is the e-mail that -- the
24 Ekhlaas webpage was written on the back of one of these
25 pages. And again, you'll see in the subject line,

1 brackets, it says, IAI Iraq, and then it says Just Jeans at
2 JJH.com.au to Marwan El-Hindi@Yahoo.com on Friday the 18th
3 of February.

4 This fits in in two different ways. First of
5 all, the Just Jeans group just based on this e-mail
6 alone -- Mr. Kohlmann, we proffered him to come in and say
7 that he's familiar with this particular IAI Iraq word
8 because it relates directly to a Yahoo group by the same
9 name, IAI Iraq which was used as a mailing list, which
10 Mr. Kohlmann was a member of, and he would receive regular
11 e-mails that related to video releases and most
12 specifically to this case, the IED e-mail that Mr. El-Hindi
13 forwarded to Mr. Griffin. And we would really --
14 Mr. Kohlmann would briefly just say, yes, there was Islamic
15 Army of Iraq and explain briefly what that group is. My
16 understanding is Mr. Amawi's team is not willing to
17 stipulate to any of the groups that we had posed. We had
18 talked about this.

19 MR. WHITMER-RICH: I think we probably can reach
20 a stipulation on those matters.

21 THE COURT: Okay. Let him finish up.

22 MR. WHITMER-RICH: Just tossing in my 2 cents.

23 MR. HERDMAN: As of last week, my understanding
24 was they weren't going to stipulate to any of these groups.
25 But nonetheless, the Islam Army group that has conducted

1 terrorist attacks, terroristic type attacks in Iraq. And
2 it ran a particular mailing list in 2004 and 2005,
3 subscribers to which would receive e-mails that provided
4 updates on the group's activities and certain information.
5 And again, Mr. Kohlmann, as a member of that Yahoo group,
6 he's familiar with the Islamic Army of Iraq which also
7 carries video releases -- some of which will be played for
8 the jury -- and he will be able to say that this particular
9 designation here in brackets relates to that Yahoo groups,
10 the IAIIraq@Yahoogroups.

11 THE COURT: I didn't hear --

12 MR. HERDMAN: IAIIraq@Yahoogroups. And what
13 we're trying to do here, Your Honor, is -- I have to show a
14 link here. Is that -- we're --

15 THE COURT: I couldn't hear you.

16 MR. HERDMAN: I have to show the lay in
17 testimonies of our proof so you know where we're coming
18 from with this. Is that this e-mail from Just Jeans
19 purports to be something completely nonsinister, something
20 that's a regular business venture. It's only in the
21 subject line that the true nature of what this -- this
22 particular website is actually comes to light.

23 And when you take this e-mail, Just Jeans
24 confirmation e-mail, and you compare that with the e-mail
25 that Mr. El-Hindi forwarded to Mr. Griffin from

1 IAIIraq@Yahoogroups, it's clear that this Just Jeans
2 website or e-mail is working in some way to advance this
3 IAIIraq@Yahoogroups.com mailing list. And that's -- and
4 all of this proof kind of goes together.

5 But most importantly, we actually have an e-mail
6 from the mailing list that Mr. Griffin was forwarded by
7 Mr. El-Hindi. And Mr. Sofer just reminded me that's
8 actually a distribution account in the government's
9 indictment, that Mr. El-Hindi forwarded the descriptive
10 device or bomb-making information to Mr. Griffin. And
11 obviously, the fact that -- the fact that this e-mail was
12 forwarded is proof, but it's much more important where that
13 e-mail originated from. The fact that it came from a
14 mailing list that was linked to Islamic Army of Iraq is
15 important in not only the information itself, but it's
16 important in testimonies of Mr. El-Hindi's knowledge of
17 what it was that he was forwarding to Mr. Griffin.

18 THE COURT: Again, I would tend to agree. But I
19 don't want to spend a whole lot of time on the IAI --
20 AIAI -- if that's the correct -- yeah. I think that he can
21 testify that this is a mailing list, that one can register
22 to get periodic e-mail transmissions, and I think he can
23 probably say of the general kind or sort and that the
24 simply the -- what the -- according to his understanding,
25 the Islamic Army in Iraq -- that's the correct term?

1 MR. HERDMAN: Yes.

2 THE COURT: -- is without a great deal of
3 elaborations. But this is a source for various kinds of
4 videos and that this one came from there and make those
5 connections and that's it.

6 But again, I think that, once again, it is
7 probative, and I think properly and objectively
8 presented --

9 MR. SIEVE: Your Honor, if I may. As it relates
10 to not only, especially Mr. Amawi, but Mr. El-Hindi, my
11 concern with Mr. Kohlmann coming in and giving his
12 expertise about what these proofs are, Judge, is just that.
13 That's Mr. Kohlmann's expertise. I'm afraid that there's
14 going to be some transfer answer of his expertise to our
15 clients. As somehow our clients knew what Mr. Kohlmann was
16 doing with these sites. And I would expect that
17 Mr. El-Hindi knew nothing of what Mr. Kohlmann is going to
18 say something about these sites, just something that he
19 stumbled across when he was on the Internet.

20 As I was reminded by my client just now, if
21 someone's looking at pornography on the Internet and the
22 pornography comes from one particular site and someone
23 knows who created that site and what it's all about, as
24 compared to -- and then, you know, they get it from that
25 site on the Internet and go somewhere else and they find it

1 there, the person looking at the pornography cares very
2 little how it got there, they're just interested in looking
3 at the pornography. That's the same for our clients,
4 unless they can prove that our clients had the same expert
5 knowledge about these things that Mr. Kohlmann has about
6 these things.

7 THE COURT: And I'm trying to draw that line.
8 I'm saying persons who were signed up for this e-mail
9 service could, during this period of time, receive
10 materials of this sort, and the group that provided them
11 was the Islamic Army in Iraq. And it was an organization
12 that was part of the insurgency, period, end of discussion.
13 And I think that that bit of description is appropriate. I
14 don't think that it's prejudicial value is -- is --
15 substantially outweighs the probative value.

16 Clearly, in cross-examination, and in particular
17 to Mr. Kohlmann, because he obviously wouldn't have a clue,
18 you don't know whether Mr. El-Hindi opened those e-mails.
19 You have no idea to the extent of his knowledge of any as
20 to what the Islamic Army in Iraq is or was and so forth.

21 Again, this is -- I suspect all of you was are
22 signed up for various kinds of e-mail services and
23 sometimes we open them and sometimes we don't. And -- but
24 with regard to the one that was forwarded, I think it's
25 more likely than not that its contents were known to

1 Mr. El-Hindi, and I think the government can at least argue
2 that it -- his circumstantial groups, that he was familiar
3 with the contents of at least that transmission, and also
4 argue that the fact that you forward something doesn't
5 necessarily mean that you opened it up. But I think it's a
6 fair inference the parties can argue about. So I think
7 that this is admissible.

8 But again, I don't know how many times I can
9 emphasize, I don't want, you know, the 40 pages of
10 Mr. Kohlmann's report about all these different groups and
11 origins and the terrible things that they've done and how
12 long they've been in existence and who all the principles
13 are. No.

14 I'm talking about the stuff that came into the
15 hands and passed through the hands of one or more of the
16 defendants, that were viewed by one or more of the
17 defendants in Mr. Griffin's company. And the purpose is to
18 let the jury understand the significance in terms of both
19 substantive elements, particularly of the bomb vest video
20 and the overt acts and also the intent. And to some
21 limited extent, I believe, probably relative to the common
22 understanding, and therefore -- and it's at least -- may at
23 least be indirect proof of that.

24 So I think that for those reasons, it does have
25 pertinency, relevance, materiality, probative value, which

1 are not substantially outweighed about the risk of unfair,
2 undue prejudice.

3 I think I made clear in my opinion I was
4 concerned with the lack of nexus as I saw at the time
5 between the stuff that I understood Mr. Kohlmann was going
6 to be saying, things that he was going to be saying, stuff
7 that he was going to talk about, and any of these
8 defendants. And I think that the government has responded
9 to those concerns. And all I can do is I can assure the
10 defendants that if Mr. Kohlmann tries to wonder off the
11 reservation and outside the corral, in trying to see that
12 he's contained within, I'll make very clear to the jury,
13 it's not --

14 MR. HERDMAN: And Your Honor, just to briefly
15 review an item that we first started talking about, this
16 notion that Mr. Amawi had a large collection of videos.
17 Again, Your Honor, our intent is not to have Mr. Kohlmann
18 come in and testify about all of those individuals.

19 However, we do have witnesses prepared to come in
20 and say, I viewed -- a nonexpert witness -- a witness who's
21 prepared to come in and say I viewed certain videos. And
22 the fact that they're on certain directories is quite
23 important to us. For instance, Mr. Amawi, you'll hear him
24 reference in numerous recordings the fact that he wants to
25 catalog his CDs, he says that numerous times. In fact, we

1 do have evidence that Mr. Amawi did go about cataloging
2 some of these videos at one point in time. And he did that
3 in a manner that makes it very clear that he had extensive
4 knowledge about the individuals that Mr. Kohlmann addresses
5 in his report.

6 THE COURT: Mr. Kohlmann coming before or after
7 that witness?

8 MR. HERDMAN: He would be coming after, probably,
9 all the witnesses that we would call.

10 THE COURT: Then why don't I reserve judgment as
11 to that and see what the witness says just to see what you
12 have shown me this afternoon.

13 MR. HERDMAN: Thanks.

14 THE COURT: I will better be able to evaluate the
15 propriety. I certainly would not want Mr. Kohlmann to
16 testify that his -- it's the largest collection aside from
17 his own that he's ever seen.

18 MR. SIEVE: Your Honor, if Mr. Kohlmann's going
19 to testify at all about Mr. Amawi's collection that hasn't
20 been presented through Darren Griffin or any other witness,
21 but just focus on his computer that goes right to the heart
22 of our expert's testimony -- and that is Islam -- who will
23 testify about sort of this Jihadist movement and around the
24 world are videos and collect them for other reasons other
25 than becoming part of the Mujahideen.

1 THE COURT: I continue to have -- have a nexus
2 between Mr. Amawi and that sort of purpose of accessing
3 these videos. The fact that others engage in sort of
4 customary practice, I don't think is proof that somebody,
5 all be it similarly situated, does so as well. I really
6 think there's a logical fallacy there.

7 MR. SIEVE: Then the government shouldn't be
8 permitted to create the inverse of that.

9 THE COURT: Well, part of my concern about -- I'm
10 trying to restrict Mr. Kohlmann's testimony about any of
11 these videos to circumstances in which it is reasonable to
12 conclude that they were viewed, that their contents were
13 known. This is said, at the outset of the session this
14 afternoon, at least when I came back, I've got lots of
15 favorites and I've got lots of stuff, e-mail and otherwise,
16 probably a fraction of it I have any direct knowledge of
17 its contents. I may know the title or whatever, but for
18 lots of reasons, I don't become cognizant of the contents.
19 And absent proof that Mr. Amawi was cognizant of the
20 contents, the fact that the stuff came in, he downloaded
21 it, that is some proof that something happened thereafter.
22 And.

23 Mr. Herdman has said, Judge, we have a witness
24 who's going to come in and say -- will tell you about how
25 actions were taken relative to the downloaded stuff. And

1 that's about all I've heard. I'm going to wait and see
2 what this person says before proceeding further into that
3 request on the part of the government.

4 I think it's important that the record, that the
5 evidence show a connection that cognizant -- that something
6 was done with this material that made one or more of the
7 defendants cognizant of its contents. The mere collecting
8 of it, I don't think has any probative value. Or certainly
9 its probative value is outweighed by the substantial risk
10 of prejudice. But once there's reason to believe that the
11 defendant became cognizant of it, he, then -- I think it's
12 appropriate to permit proof as to what it was for most of
13 this stuff. That proof is the video itself.

14 For some of it this afternoon, I've indicated
15 Mr. Kohlmann can tell us, tell the jury, what it was
16 because there's no other proof of it, but as to that issue
17 we'll wait and see.

18 MR. HERDMAN: Your Honor, the last thing is -- I
19 guess we addressed this a little bit with the Islamic Army
20 of Iraq. There were a number of groups that were
21 originally on that list of stipulations. My understanding
22 was, Mr. Amawi was unwilling to stipulate to the proposals
23 that we had come to regarding some of these groups, and
24 Your Honor had said last week that Mr. Kohlmann will be
25 free to testify should be there be no stipulation.

1 THE COURT: Sure. If there's no stipulation, I
2 think the jury's entitled to be told very briefly, you
3 know, so and so, so and so, it is according to
4 Mr. Kohlmann's understanding, based upon the work that he's
5 done, was a Lieutenant in the whatever, and he was killed
6 by coalition forces on whenever, or he accepted
7 responsibility for whatever. One sentence, two sentences,
8 real thumbnailed biography, so that when the jury recalls
9 the evidence -- or as I expect, a fair portion of it may be
10 replayed to it and for it -- it will have some
11 understanding of what -- what that reference means.

12 MR. HERDMAN: And again, groups that we would
13 have Mr. Kohlmann testify to are by and large -- I can't
14 think of an exception to this -- there are groups that have
15 actually produced the videos that are going to be played
16 for the jury, so it's just a matter of identifying insignia
17 and explaining a sentence or two of what this group is.

18 THE COURT: And I will remind the jury that
19 they're not to draw any inference of any connection to any
20 of these defendants, any of those groups, from the fact
21 that those groups produced them. Just like I don't have
22 any connection with Warner Brothers when I rent one of
23 their movies.

24 MR. WHITMER-RICH: And Your Honor, if I can
25 briefly explain, we have taken the position in the past

1 that we are not inclined to stipulate as to certain matters
2 because we were proposing certain experts who would testify
3 about the phenomenon of these videos, generally. And it
4 was -- as a strategic matter, is not clear to us why
5 stipulating to all of those would be in our interest, our
6 client's interest. To the extent that, Your Honor, for
7 whatever reasons, disallowed, for reasons I tried to
8 explain -- disallows our expert testimony, then that
9 strategic reason is no reason --

10 THE COURT: I'm very strongly --

11 MR. WHITMER-RICH: -- and I'm simply explaining
12 why it may appear that we were flip-flopping here, giving
13 inconsistent positions; that the landscape is shifting for
14 us and we're responding accordingly.

15 THE COURT: I understand. I understand
16 completely. Excuse me. Just so you understand, I spent a
17 lot of time this weekend reviewing stuff and thinking about
18 it, and I'm it's highly unlikely I'm going to allow Mr --

19 MR. WHITMER-RICH: Alterman.

20 THE COURT: -- Alterman to testify. You should
21 anticipate that I'm not going to, largely for the reasons
22 that I've already discussed.

23 MR. HARTMAN: Judge, can I clarify something?
24 When you were talking about the groups that produced the
25 videos, did that mean all the videos that were watched or

1 just the ones that they showed?

2 THE COURT: The stuff that we're talking about
3 right now.

4 MR. HARTMAN: Okay.

5 THE COURT: No. I don't expect -- I haven't
6 heard a request to go through and link up every single
7 video, and I would say, no, those videos, see a tank or
8 check point or whatever is being blown up, it speaks for
9 itself.

10 MR. HARTMAN: Okay, got it.

11 MR. BOSS: Could we go off record for just a
12 moment?

13 (A brief discussion was had off the record.)

14 MR. SOFER: Judge, just for clarification
15 purposes because I'm not clear about this either now, with
16 respect to the groups, we're going to try to get a
17 stipulation from counsel about all the groups that are
18 mentioned or can be seen on the videos, whatever's been
19 played to the jury to fill in these gaps. We cannot get a
20 stipulation on those groups, or what is it that Your Honor
21 believes you'll allow Mr. Kohlmann to testify as to that?
22 Now I'm not clear what we're left with.

23 THE COURT: Let's wait and see. I can't --
24 again, it's the type. I'd rather deal with reality rather
25 than if this, then that; on the other hand, if this, minus

1 one, then that, plus two, and so forth.

2 MR. SOFER: Well, we'll see what we work out with
3 counsel if anything, and we'll take it from there.

4 THE COURT: Yeah.

5 MR. SIEVE: Your Honor, if I may just very
6 briefly. If I may, just to be blunt for a moment, as it
7 relates to this Evan Kohlmann matter -- and I'm not even
8 ashamed to put some of this on the record. There was a lot
9 of concerns amongst the defense attorneys collectively
10 about us trying to present expert witnesses in this case
11 because of the fear that, quote, we would open the door to
12 Evan Kohlmann, and I said bluntly to others that -- and
13 I'll clean up what I said -- but what I said in the general
14 was that I was not going to wet my pants over Evan Kohlmann
15 because I felt this, our experts could respond to his
16 absurd nature, the manner in which he twists this
17 information in a way that's favorable to the government,
18 that it would blow him out of the water.

19 But if we're not going to be permitted to call
20 our experts in response to Mr. Kohlmann, then I agree with
21 the other attorneys in this case that he's dangerous,
22 because he's a loose cannon. There's no way that we can
23 control him even to the extent that Your Honor's going to
24 control him. So we're prepared --

25 THE COURT: If that happens, then I will deal

1 with that when it happens. I think -- I cannot know -- I
2 do not know how I can more strongly communicate to the
3 government that it's up to it to see to it that he
4 understands the limited range of subjects that he's going
5 to be permitted to testify. And indeed, think about this,
6 to the extent that we permit the government to lead him so
7 he says yes or no, rather than going on as a device to
8 control him, I think he will understand the cautionary
9 instructions that he'll be given.

10 If not, I certainly will -- he won't look good in
11 the eyes of the jury by the time I get done with him. If
12 he sits there and ignores my instructions, they will be
13 given with increasing vigor. They'll start out polite and
14 quiet, which is my style. But I'm not opposed to making
15 real clear to the witness that he's not paying attention.

16 MR. SIEVE: The point I'm trying to make, Your
17 Honor, if we're not permitted to call witnesses in response
18 to the testimony that he will present, and Your Honor's
19 going to narrow his testimony to the extent that he's just
20 going to be providing definitions for the jury, I believe
21 that we can --

22 THE COURT: He'll do more than that. He'll be
23 making some connections that the government represents are
24 proper for him to make in light of the charges I agree with
25 the government. It is relevant evidence, and it is

1 probative of facts and issues. I think we've got four or
2 five chunks, which would probably amount to four or five
3 pages of the 80 or 90 pages that we've all read.

4 So again, as I said, you know, the government
5 could have waited until it rested and then moved in limine
6 to strike your witnesses. I think the way we are going
7 about it is proper, because although the landscape is
8 changing, and that is a commonplace occurrence in every
9 trial, I am trying to cast as much light as I can on what
10 lies ahead. And I do not deny any party the opportunity to
11 present evidence that it thinks is probative materially.
12 And to be sure, I can sit back and say, fine, we'll let it
13 all in. What do I care? The government loses, they can't
14 appeal, big deal. It's not.

15 MR. SIEVE: I understand, Your Honor. And I
16 understand that Your Honor's consideration goes to our
17 effort to present evidence that we believe is appropriate
18 material as well.

19 THE COURT: Absolutely. And no doubt, if there
20 is a conviction of anyone, that will be without question an
21 issue on appeal.

22 MR. SIEVE: In essence, what -- in response to
23 Mr. Kohlmann, we believe that these witnesses will -- were
24 tentum -- were tantamount to us being able to present a
25 defense of the types of things that we anticipated that he

1 may say based upon what he said earlier.

2 THE COURT: And to the extent that you're right,
3 that it is a rejoinder to much of what he was saying, I
4 think that I continued to make clear that that sort of
5 stuff isn't going to come into this courtroom.

6 MR. SIEVE: Understood, Your Honor.

7 THE COURT: I said all along this case is not a
8 capital T terrorism. It's about the criminal charges,
9 allegations conspiring to provide material support in
10 furtherance of -- and also, quite candidly, I don't think
11 this case is about capital I Islam. And either -- sure
12 there are threads and connections, but that's not what
13 this -- this is a criminal case.

14 And we sit and look at the elements of the
15 charge, and if evidence is probative of one of those
16 elements or of the defense, it comes in. If it's not, it
17 doesn't.

18 Chuck, go ahead. And good luck to you.

19 MR. BOSS: Thank you, Judge I'm waiting on my
20 ride.

21 MR. HARTMAN: That's me.

22 THE COURT: Anything further?

23 MR. SOFER: No, Your Honor.

24 THE COURT: Okay. We'll start at 8:30 in the
25 morning.

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

s:/ Angela D. Nixon

Angela D. Nixon, RPR, CRR

Date